No. 91-904-CFX
Status: GRANTED

Docketed:
December 3, 1991

Title: Concrete Pipe and Products of California, Inc., Petitioner
v.
Construction Laborers Pension Trust For Southern California

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Nelson,James

Counsel for respondent: Miller Jr.,John S.

121691 counsel states respond corr as above

Entry	Date	Note	Proceedings and Orders
1	Dec 3 1991	G	Petition for writ of certiorari filed.
2	Jan 8 1992		DISTRIBUTED. January 24, 1992
4	Jan 21 1992	P	Response requested -- WHR. (Due February 21, 1992)
5	May 6 1992		REDISTRIBUTED. May 22, 1992
6	May 8 1992	X	Brief of respondent Construction Laborers Pension Trust in opposition filed.
7	May 15 1992	X	Reply brief of petitioner Concerete Pipe and Products filed.
8	May 26 1992		Petition GRANTED. limited to Questions 2 and 4 presented by the petition.
			**********
9	Jul 10 1992		Brief amici curiae of Midwest Motor Express Inc., et al. filed.
10	Jul 10 1992		Brief amicus curiae of American Trucking Associations, Inc. filed.
12	Jul 10 1992		Joint appendix filed.
13	Jul 10 1992		Joint Appendix in two volumes
14	Jul 10 1992		Brief of petitioner Concrete Pipe and Products of California, Inc. filed.
15	Jul 27 1992	G	Motion of Pension Benefit Guaranty Corporation for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Jul 31 1992		Order extending time to file brief of respondent on the merits until September 11, 1992.
18	Aug 11 1992		Record filed.
		*	Original proceedings United States District Court, Central District of California (1 BOX)
19	Aug 17 1992		Record filed.
		*	Partial proceedings U. S. Court of Appeals for the NinthCircuit.
20	Sep 11 1992		Brief amicus curiae of AFL-CIO filed.
21	Sep 11 1992		Brief amicus curiae of Pension Benefit Guaranty Corp. filed.
22	Sep 11 1992		Brief amicus curiae of American Academy of Actuaries filed.
23	Sep 11 1992		LODGING consisting of ten copies of one document received from amicus American Academy of Actuaries.
24	Sep 11 1992		Brief amici curiae of Teamsters Pension Trust Fund of Philadelphia, et al. filed.
25	Sep 11 1992	G	Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as amicus curiae filed.
26	Sep 11 1992		Brief of respondent Construction Laborers filed.
27	Sep 11 1992	G	Motion of Central States, Southeast and Southwest Areas Pension Fund for leave to file a brief as amicus curiae filed.
28	Oct 5 1992		Motion of Pension Benefit Guaranty Corporation for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
29	Oct 5 1992		Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as amicus curiae GRANTED.
30	Oct 5 1992		Motion of Central States, Southeast and Southwest Areas Pension Fund for leave to file a brief as amicus curiae GRANTED.
32	Oct 9 1992		Reply brief of petitioner filed.
31	Oct 13 1992		SET FOR ARGUMENT TUESDAY, DECEMBER 1, 1992. (2ND CASE).
33	Oct 15 1992		CIRCULATED.
34	Dec 1 1992		ARGUED.

No. 91-904-CFX

Entry Date Note Proceedings and Orders

91-904

Supreme Court, U.S.
FILED
DEC 3 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991
No. 91- _____

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

vs.

CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did 29 U.S.C. § 1401 permit the district court to order the parties to arbitrate the question of statutory interpretation which determines the existence of the arbitrator's and Court's jurisdiction?

2. Do the presumptions in 29 U.S.C. § 1401 favoring multi-employer plans like Construction Laborers Pension Trust for Southern California (hereafter "CLPT") violate the due process rights of Concrete Pipe and Products by denying access to an impartial decision maker?

3. Does 29 U.S.C. § 1383 permit respondent multi-employer plan to convert a pre-MPPAA complete cessation of the covered operations into a post-MPPAA withdrawal?

4. Do the provisions of the Multi-Employer Pension Plan Amendments Act (hereafter "MPPAA") violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied*, by retroactively imposing withdrawal liability on an employer who never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?

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[1] **CERTIFICATION PURSUANT TO RULE 14.1(B) AND 29.1**

The only parties to the action are those listed in the caption. Petitioner Concrete Pipe and Products has no subsidiaries, and its parent corporation is Concrete Pipe and Products, Inc. Respondent CLPT is a Taft-Hartley Trust Fund, and to the best of petitioner's knowledge, has no parent or subsidiaries.

E. MPPAA Violates the Fifth Amendment Rights of Employers like Concrete Pipe and Products Where There is no Rational Connection Between the Expectation of the Parties and the Resulting Withdrawal Liability and None of the Unfunded Vested Liability in the Plan Can be Attributed to the Withdrawing Employer 16

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I
OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

A portion of an early phase of this case is described in *Construction Laborers Pension Trust v. Cen-Vi-Ro Concrete Pipe and Products Company Inc.*, 776 F.2d 1416 (9th Cir. 1985). The only other published reference in this case is the table entry on 936 F.2d 576 (9th Cir. 1991).

II
THE SUPREME COURT'S JURISDICTION

The statutory provision believed to confer jurisdiction on this court by writ of certiorari is 28 U.S.C. § 1254(1). The jurisdiction of this court is invoked pursuant to Supreme Court rule 10.1(a) and (c). Judgment on appeal in this case was entered on June 27, 1991. A timely petition for rehearing and suggestion for rehearing *en banc* was filed, and both the petition and the suggestion were denied by the Ninth Circuit Court of Appeals on September 24, 1991.

III
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

This case involves U.S. Const. Amendment V, various provisions of the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, *et seq.* and 29 C.F.R. § 2647.8. The full text of these constitutional provisions, applicable statutes and regulations is set forth in the appendix pursuant to Supreme Court Rule 13.1 (f).

IV
STATEMENT OF THE FACTS

This case presents a number of significant questions about the assessment of withdrawal liability under the Employee Retirement Income Security Act of 1974 (ERISA) and the Multi-Employer Pension Plan Amendments Act ("MPPAA"). Consistent with Supreme Court Rule 14(i), the District Court's asserted basis for federal jurisdiction was 28 U.S.C. § 1331, 29 U.S.C. §§ 1401 and 1451(c). From the inception of this litigation in the fall of 1982 through the present, there have been no significant disputed facts. (*See* C.R. 49).[2]

[2]All "C.R." references are to the clerk's record on appeal to the Ninth Circuit in Case 82-5184 originally in the United States District Court for the Central District of California, unless otherwise indicated. There are, however, three District Court cases which comprise this dispute. This fact does not appear to have any substantive impact on any of the issues in the case or on any of the questions on which review is sought.

A. **The Parties**

Petitioner was created to manufacture and sell concrete pipe in California. Assets with which the pipe manufacturing business was to be conducted were purchased from a totally separate entity during 1976, four years prior to the enactment of MPPAA.[3] (C.R. 124, Company Exhibit 14). The assets purchased included two plants with accompanying manufacturing equipment. One plant was located in Southern California near the town of Shafter (the "Shafter Plant") and the other was located in Northern California near Sacramento. Only the Shafter Plant was covered by a union contract requiring contribution to Respondent. Concrete Pipe and Products marketed its pipe throughout the state during all times relevant to this dispute.

Respondent Construction Laborers Pension Trust for Southern California ("CLPT") is a multi-employer pension trust which was established in 1962. (C.R. 49, para. 2).

CLPT is operated and governed by a board of trustees who owe fiduciary duties to the participants of the plan under 29 U.S.C. § 186 and under ERISA, 29 U.S.C. § 1101, *et seq.* CLPT is formed and governed under a trust agreement entered into between the Southern California District Counsel of Laborers (the "Union") and several multi-employer associations. (C.R. 49, para. 6). The CLPT board of trustees is selected by the Union and the multi-employer associations. (C.R. 49, para. 6). These collective bargaining agreements require signatory employers to make contributions to CLPT for each hour worked by the employee within the bargaining unit covered by the union contract. (C.R. 49, para. 7).

Concrete Pipe and Products is not now nor has it ever been a member of any of the multi-employer associations which appoint the trustees of CLPT. (C.R. 49, para. 29). No shareholder, officer, director, agent, or representative of Concrete Pipe and Products has ever had any participation in (a) the investment decisions on assets of CLPT; (b) CLPT trustee decisions to adjust pension benefit levels; (c) the decisions affecting CLPT's administrative costs; or (d) the selection of actuarial or accounting assumptions or methods on which the withdrawal liability in this dispute has been calculated. (C.R. 49, para. 28).

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[3] The District Court affirmed the arbitrator's finding that this asset sale did not shift withdrawal liability of the Seller to Concrete Pipe and Products, and this issue was not appealed by CLPT. (*See* C.R. 127 p.8)

Concrete Pipe and Products was, at one time, a signatory to a collective bargaining agreement requiring contributions into CLPT. Pursuant to the agreement, Concrete Pipe and Products paid a total of $102,656.68 into CLPT. (C.R. 49, para. 10). The collective bargaining agreement did not guarantee or specify any certain pension benefit level for pension beneficiaries. (C.R. 49, para. 31). The CLPT trust agreement specifically provides that each employer's liability to the plan is limited to that required as contributions to the fund pursuant to the individual collective bargaining agreements. (C.R. 49, para. 32 (Declaration of Trust, Article 4). Pursuant to the terms of the trust agreement, neither the employer associations, an individual employer, or any local union or any employee shall be liable or responsible for any debts, liabilities, or obligations of CLPT. (C.R. 49, Declaration of Trust, Article 4, para. 31).

No employee of an employer contributing to CLPT can have an expectation of a guaranteed monthly pension benefit. The appropriate collective bargaining agreements contain specific disclaimers including a highlighted and capitalized notice advising all employees that the employer's sole obligation is to make contributions called for in the collective bargaining agreement and pension benefit levels are payable only to the extent that the fund has assets to pay benefits. (C.R. 49, para. 33). That disclaimer also specifically declares "pension benefits are not and have never been guaranteed." *Id.* The primary agreement through which contributions were made to the trust, the 1977 through 1980 Master Labor Agreement, specifically provided that the CLPT was created, negotiated, and was intended to be a defined contribution plan and that individual employer liability was limited exclusively to making the contributions specified in the collective bargaining agreement. (C.R. 49, para. 34).

CLPT trustees have exercised their power to increase benefits through changes in the value of pension credits. *See Ponce v. Construction Laborers Pension Trust,* 628 F.2d 537, 540 (9th Cir. 1980) *(Ponce I)* and *Ponce v. Construction Laborers Pension Trust,* 774 F.2d 1401, 1402 (9th Cir. 1985) *(Ponce II).* In fact, CLPT trustees increased benefits by ten percent in 1980 (without an increase in contributions) thereby increasing the unfunded vested liability by at least ten percent.

B. **Chronology of the Dispute**

Concrete Pipe and Products purchased the assets through which it would manufacture concrete pipe at both the Sacramento and Shafter facilities on December 1, 1976. (C.R. 124, Exhibit 14). Concrete Pipe and Products complied with the former collective bargaining agreement requiring contributions to CLPT initially. In 1978, a new contract with the laborers Union covering employees at the Shafter facility was negotiated. That contract was scheduled to expire by its own terms in May 1981. (C.R. 49, para. 12). Under the terms of the collective bargaining agreement, contributions were to be made measured by hours worked by covered employees in laborers' classifications at the Shafter facility. (C.R. 49, para 13).

On August 17, 1979, Concrete Pipe and Products ceased all production at the Shafter Plant. (C.R. 49, para 14). Petitioner began laying off all of its employees at Shafter and removing the machinery used to manufacture pipe, shipping the machinery to Sacramento for use in the remaining Concrete and Pipe and Products plant. (C.R. 49, para. 16). Employees at Shafter engaged in operations covered by the union contract worked 1,781.75 hours in August 1979, 65 hours in September 1979 and 24 hours in October 1979. (C.R. 49, para. 17). By the end of October 1979, only two full-time employees remained at the Shafter Plant, neither of whom were employed in capacities covered by the collective bargaining agreement, and thus, no contributions were made or required to be made to CLPT on their behalf.[4]

The considerations which led to the closure of the Shafter Plant were purely economic and unrelated to labor cost. Construction in the area where the Shafter Plant was located was declining and demanded types of pipe made from materials other than concrete. (C.R. 124, Joint Exhibit 4, pp. 13-18). Concrete Pipe and Products' nine largest Southern California competitors were located in the more active Riverside/San Bernardino area further south in California. These locations gave competitors a substantial advantage both in terms of reduced transportation costs as well as reduced time of delivery. (C.R. 124, Joint Exhibit 4, p. 100). It was uncontested that Concrete Pipe and Products' executives ordered the plant closure based on these

[4]A handful of hours were reported to CLPT during April 1980 for hours worked when temporary employees were hired to pack and ship the last of the Shafter equipment for transport to Sacramento.

competitive factors and planned to establish new Southern California production operations in the Riverside/San Bernardino area. (C.R. 124, Joint Exhibit 4, pp. 13-14). This change of location would have ended both the Collective Bargaining Duty and the Duty to Contribute because the contract covered only those operations at the precise location of the Shafter Plant. From the fall of 1979 forward, Concrete Pipe and Products made extensive efforts to find a new location in the Bernardino/Riverside area.

Concrete Pipe and Products also attempted to negotiate relief from its lease. The lease required Petitioner to return the land on which the plant was located to the state that had existed prior to the time that a concrete pipe manufacturing plant had been erected on the site. (C.R. 124, Joint Exhibit 4, p. 100). The estimated cost to perform this restoration was approximately $325,000. (C.R. 51). At the same time, the rent was only $12,000 per year. (C.R. 124, Joint Exhibit 4, p. 100). The landlord rejected all proposals to grant relief from this provision of the lease. (C.R. 124, Joint Exhibit 4, pp. 22, 27, 31). Concrete Pipe and Products also had a large inventory of unsold pipe on site as well as an obligation to store a large quantity of pipe previously sold in return for a storage fee of $500 per month. (C.R. 124, Joint Exhibit 4, pp. 73-74, 94). Concrete Pipe and Products therefore determined it was less expensive to pay the rent at Shafter for an empty plant than to abandon the property, move the inventory to an interim site, move it a second time to the contemplated new location, and pay the expenses associated with restoring the Shafter site to its prior condition.

On September 26, 1980, the Multi-Employer Pension Plan Amendments Act (MPPAA) became effective. 29 U.S.C. § 1461(e). The events described above all took place before MPPAA with the exception of the ongoing efforts to try to locate a new facility to replace the closed Shafter Plant. On the date MPPAA was enacted, the Shafter plant had been shut down for more than a year.

The union which formerly represented employees at the Shafter Plant provided notice during April 1981 of an Intention to terminate the collective bargaining agreement and requested negotiations for a successor contract. (C.R. 49, para. 11-12). At that point no manufacturing activity had occurred at the Shafter facility for at least 20 months. (C.R. 49, para. 11-12). Concrete Pipe and Products, consistent with its duty under 29 U.S.C. § 158(d), notified the Union that the existing

union contract was terminated. Concrete Pipe and Products did not refuse to bargain but explained to the union that negotiations would not be worthwhile since the plant was closed, with no intention of reopening it. (C.R. 49, para. 11 and Exhibit "A" in case 82-5184). Negotiations were held and the second session resulted in an impasse in the bargaining between the parties. (C.R. 49, para. 13). At the time the impasse occurred, no concrete pipe had been produced in the Shafter facility for at least 26 months and no contributions, of any kind, had been made to CLPT for more than 19 months, a time period beginning well before the effective date of MPPAA.

Concrete Pipe and Products' efforts to market throughout the state of California continued during the period of time when the Shafter Plant was closed and a new site was being sought. These marketing efforts yielded a contract in Southern California to make a substantial quantity of pipe. The point of delivery was relatively close to the location where the former Shafter facility was located. A decision was made that it would be more efficient to convert the empty Shafter facility into a plant capable of manufacturing concrete pipe than it would be to supply the contract from the existing Sacramento facility several hundred miles to the north. Equipment was therefore removed from the Sacramento facility, shipped down to Shafter, and a concrete manufacturing pipe operation was created on the same site where manufacturing operations had terminated more than two years earlier.

CLPT issued a notice of assessment of withdrawal liability in 1982. CLPT claimed that there had been complete cessation of the obligation to contribute as of January 1, 1982. CLPT has taken the position that the 1979 closure did not constitute a withdrawal from participation in the trust.

C. **Proceedings Below.**

CLPT filed its action, CV 82-5184 MML, in the Central District of California against Concrete Pipe and Products on October 5, 1982, seeking $268,168.81 as withdrawal liability. At the same time, Concrete Pipe and Products filed an action to preclude the assessment in the Eastern District which was transferred and became case number 83-132 and consolidated before Judge Malcolm Lucas in the Central District. The parties conducted discovery, prepared an extensive stipulation of facts (C.R. 49), and cross-motions for summary judgment were filed with each side requesting an adjudication on the merits.

On April 4, 1984, Judge Lucas issued an order *sua sponte*

requiring the parties to arbitrate the issue of whether Concrete Pipe and Products withdrew from the trust prior to the effective date of MPPAA. The parties and the District Court were in agreement that if the withdrawal occurred prior to September 26, 1980, MPPAA did not apply and no withdrawal liability is owed. Judge Lucas refused to resolve the main constitutional issues raised or the jurisdictional question of when the withdrawal occurred. Instead, the court retained jurisdiction over the consolidated actions pending an attack on the arbitrator's award. (C.R. 68). Concrete Pipe and Products appealed and the Ninth Circuit dismissed the appeal on November 21, 1985 because the order was not ripe for appeal. *Construction Laborers Pension Trust v. Cen-Vi-Ro Concrete Pipe and Products, Inc.*, 776 F.2d 1416 (9th Cir. 1985). The case was then remanded to the District Court, which in turn referred the matter to arbitration.

Arbitration was conducted pursuant to 29 U.S.C. § 1401 during 1987 and 1988. The 1987 hearing concerned the jurisdictional issue of whether Concrete Pipe and Products withdrew before the effective date of MPPAA. On this phase of the case, the arbitrator applied the 29 U.S.C. § 1401 presumptions, and ruled against Concrete Pipe and Products. The 1988 hearing concerned the validity of the withdrawal liability computation. Concrete Pipe and Products prevailed, in part, on this phase and the withdrawal liability was reduced from $268,168.81 to $190,465.57.

Concrete Pipe and Products then filed the third action (Central District Case No. 88-5759) as an action to set aside or modify the arbitrator's decision pursuant to 29 U.S.C. § 1451. The 1988 action was consolidated with the two prior actions. The parties again filed cross motions regarding enforcement of the arbitrator's award. The court issued its final order and judgment on July 5, 1989 (C.R. 127). The court treated Concrete Pipe and Products' motion for summary judgment as a petition to vacate the arbitrator's award and denied relief. The court then granted CLPT's motion to confirm the arbitration award, but denied the portion of the petition which sought to restore the amount of the award reduced by the arbitrator. Concrete Pipe and Products appealed and that appeal was denied as was the request for rehearing and rehearing *en banc*. This petition followed.

V
ARGUMENT

At the core of this dispute is CLPT's contention that the 1979 complete cessation of operations was not a pre-MPPAA withdrawal under 29 U.S.C. § 1383. A combination of erroneous jurisdiction rulings by the District Court and the presumptions contained in the MPPAA dispute resolution provisions, 29 U.S.C. § 1401, permitted CLPT to make a withdrawal liability assessment. The result is that an employer who cannot be rationally charged with an obligation for the unfunded benefits of this plan is being retroactively deprived of property without due process.

A. Rule 10 Considerations.

This dispute permits the Court to focus on a number of troubling MPPAA issues which have national impact and are directly in controversy in this case. Some of these issues have split the Circuit Courts of Appeal. Other issues deal with the constitutionality of various MPPAA provisions as applied; questions reserved by this court when it determined the facial validity of the statute in *Connolly v. Pension Benefit Guarantee Corporation,* 475 U.S. 211 (1986). One of the issues covered by this petition was most recently before the court based upon a Third Circuit decision that portions of the Act were unconstitutional and an equally divided panel of this court affirmed. *PBGC v. Yahn & McDonnell, Inc.,* 481 U.S. 735 (1987).

Apart from the disagreement between the Circuits on some of these issues, the withdrawal liability scheme and the procedural mechanisms involved in it are matters of economic life and death to many employers. The uncertainty surrounding these issues tends to deter employers from entering multi-employer plans, an outcome directly contrary to the intention of Congress in enacting MPPAA. There is also little doubt that MPPAA's harshest consequences tend to fall on relatively small employers like petitioner who lack the tenacity and resources to permit this court to review the statute as it is applied.

B. The Court Exceeded Its Jurisdiction By Compelling Arbitration Over The Question Of Statutory Interpretation Which Determined Whether Jurisdiction Existed.

Federal courts are intrinsically courts of limited jurisdiction and the limits on this jurisdiction can neither be disregarded nor evaded. *Owen Equipment & Erection Company v. Kroger,* 437 U.S. 365, 374

(1978). It is because of this limitation on jurisdiction that a threshhold issue is whether the court had the jurisdiction to take action. This bedrock principle that federal courts have no power to proceed absent an express finding that federal jurisdiction exists has been the rule of law for more than a century. *E.g., Ex Parte McCardle,* 74 U.S. (7 Wall) 506, 514 (1868). Since the days of *Ex Parte McCardle, supra,* it has not been sufficient for a court to assume or presume it has jurisdiction. Rather, the court must *find* that it has jurisdiction or it must conclude it has no power to proceed.

The district court's 1984 order compelling the parties, *sua sponte,* to arbitrate this dispute violated this basic principle. The basis for the court's arbitration order was 29 U.S.C. §.1401(a) (1) which states, in part:

> Any dispute between an employer and the plan sponsor of a multi-employer plan concerning a determination made under §§ 1381 through 1399 of this title shall be resolved through arbitration.

The core dispute between the parties here was whether the withdrawal from CLPT occurred in 1979, before the Act became effective, or in January 1982, after MPPAA became effective. Thus, the determination of the date on which the withdrawal occurred must be answered before the court can conclude that the dispute is governed by the provisions of MPPAA.

This court has held that arbitrability is "undeniably an issue for judicial determination." *AT&T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 649 (1986); *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 547 (1964). This court has also reaffirmed that a court may not refer the issue which determines whether the arbitrator has jurisdiction to the arbitrator for resolution. Instead, this is a question that must be resolved by the Court in the first instance. *See, AT&T Technologies v. Communications Workers,* 475 U.S. 643, 655-657 (1986). The underlying premise of this line of the Court's decisions is that one must first determine whether the parties intended the issue in question to be arbitrated before compelling an arbitration process. The existence of this obligation through contract is a threshold determination governing whether the court has the power to compel the arbitration to occur.

The court below found that the line of cases requiring a court to

determine arbitrability was inapplicable if the source of the duty to arbitrate arose from a statute rather than an agreement. In so doing it relied on *Teamsters Pension Trust Fund Board of Trustees of the Western Conference v. Allyn Transportation Co.*, 832 F.2d 502, 505 (9th Cir. 1987) (*Allyn*). The Third Circuit has also compelled the parties to arbitrate the question of whether the employer withdrew before the effective date of MPPAA or afterwards. *See, Warner-Lambert Co., Inc. v. United Retail and Wholesale Employees Teamsters Local No. 115 Pension Plan,* 791 F.2d 283, 287-88 (3rd Cir. 1986). (*Warner-Lambert*).

The rationale for the rule compelling a party to arbitrate the arbitrability issue in statute cases but prohibiting a similar order in contract cases is based on the prototypical distinction without a difference. In *Allyn,* the Ninth Circuit distinguished the *AT&T Technologies* line of cases as follows:

> In this case, the duty to arbitrate arose not from an agreement of the parties, but from the statute. The matters to be resolved by arbitration are not to be determined by the party's intention, but by the intention of Congress. As we have seen, the statute states unambiguously that, "(A)ny dispute between an employer and the plan sponsor . . . concerning a determination made under §§ 1381 through 1399 . . . shall be resolved through arbitration." 29 U.S.C. 1401(a) (1), and Congress clearly intended exactly what those words import.

832 F.2d at 505-506. If the arbitrator is allowed to make this decision, he or she is determining the existence of the court's jurisdiction to order arbitration. Petitioner knows of no other area of private sector labor relations under which this court has embraced the notion that arbitrators have the intrinsic power to determine their own jurisdiction. Likewise, Petitioner is unaware of another scheme which permits a non-Article III decision maker to rule dispositively on whether a federal court has jurisdiction.

Among the problems with the *Allyn* rule is that it endorses a rule of law permitting an arbitrator to force parties to accept his decision on arbitrability when he is determining Congressional intent, but not when interpreting a contract. Either way, arbitrability as the Supreme Court noted, "is undeniably an issue for judicial determination." *AT&T*

Technologies v. Communications Worker's, 475 U.S. 643 at 649. There is no support in the *AT&T Technologies* line of cases for the *Allyn* distinction. As importantly, there is no intuitive reason for the underlying rule of law that arbitrators are more clearly capable of divining Congressional intent than they are the intent of two contracting parties.

It should also be noted that the Ninth Circuit does not require arbitration of constitutionality issues. *Allyn,* 832 F.2d at 506. Thus, under *Allyn,* courts must resolve contract arbitrarily and constitutional questions but the arbitrator can resolve the statutory jurisdictional issue. The interpretation of Congressional intent more nearly resembles an examination of the Founding Father's intent than it does that of contracting parties. It is difficult to see the difference between compelling parties to accept an arbitrator's determination under Art. III of the Constitution, but not of Amendment V.

This question of how arbitrability is determined is a matter of great importance which this Court has not but should address. First, the answer determines whether an impartial federal judge *decides* the issue or an arbitrator *presumes* under the Act that the employer is covered by the Act. Second, the requirement that the parties request arbitration very early in the withdrawal liability process leads to multiple track litigation. If the employer sues to have the court determine arbitrability, but does not request arbitration, he or she may be found to have waived most rights pursuant to 29 U.S.C. § 1401(b). Conversely, if the employer pursues arbitration but does not initiate the federal action to contest jurisdiction, it could be argued that the employer has voluntarily submitted to the arbitrator's jurisdiction. This conundrum leaves employers with little choice but to file the federal action *and* request the arbitration. This parallel approach results in the kind of elongated proceedings reflected by this record.

If the court agrees that its *AT&T Technologies* line of cases applies equally to statutory and contract arbitration provisions, this case presents an opportunity to make that point clear. Regardless of the outcome on the merits, a determination on this issue will eliminate substantial uncertainty and duplicative proceedings and should result in a significant conservation of resources by parties and the courts below.

C. **The 29 U.S.C. § 1401 Presumptions Violate the Due Process Rights of Withdrawing Employers by Denying Them Access to an Impartial Decisionmaker.**

The constitutionality of the dispute resolution mechanisms under MPPAA have been in controversy from the inception of the legislation. In summary, once the dispute resolution process begins, all determinations made by the plan are presumed by the arbitrator to be correct unless the party contesting the determination can prove by a preponderance of the evidence that the determination was unreasonable or clearly erroneous. 29 U.S.C. § 1401(a)(3). Following the arbitration, the district court may review the arbitrator's decision. 29 U.S.C. § 1451. However, the district court must presume that the arbitrator is correct in deferring to the Plan's decisionmaking process unless the employer can prove by a clear preponderance of the evidence that the findings of fact made by the arbitrator were wrong. 29 U.S.C. § 1401(c). Most employers with a choice between this process and taking their chances with Lewis Carroll's Queen of Hearts would choose the latter.

This precise issue was before the Court during its October 1986 term but did not result in a precedential resolution of the question. The court granted *certiorari* to review a Third Circuit decision, *United Retail and Wholesale Employees, Teamsters Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*,787 F.2d 128 (1986), (*Yahn & McDonnell*) which declared the presumptions to be an unconstitutional denial of due process. This court was equally divided by the issue, resulting in affirmance of that particular case. *PBGC v. Yahn & McDonnell,* 481 U.S. 735 (1987).

As the District Court in this case noted, that affirmance by this Court was not sufficient to develop precedent overturning the other Court of Appeals' decisions finding this provision of the Act constitutional. C.R. 127, p. 2-3. Thus, notwithstanding this Court's action in the *Yahn & McDonnell* case, the split in the Circuits continues. The Ninth Circuit has continued to find the presumptions constitutional and ruled against petitioner on this issue below.

The status of the law subsequent to this Court's 1987 decision continues to be accurately reflected by the Third Circuit's decision in *Yahn & McDonnell* and the divided *en banc* decision by the First Circuit in *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund,* 762 F.2d 1137 (1st Cir. 1985). Thus,

neither the conflict between the Circuits nor the importance of this issue has diminished since this Court granted *certiorari* in *Yahn & McDonnell* during the 1986 term.

As a general proposition, this Court has concluded that an impartial decisionmaker is an inherent characteristic of due process. *E.g., Ward v. Village of Monroeville,* 409 U.S. 57 (1972). Among the evils resulting from the compounding presumptions of pension plan infallibility is that the presumptions become effectively irrebuttable. This Court has also noted on numerous occasions that irrebuttable presumptions violate due process. *E.g. Valandis v. Kline,* 412 U.S. 441, 453 (1973). As importantly, the court has noted that whether a presumption is rebuttable or irrebuttable, must be determined by its effect rather than its label. *Id.* at 453. Under this definition, the actuarial assumptions and methods used by the Plan to value its unfunded vested benefits, and therefore its withdrawal liability, are incapable of being rebutted in the absence of an unlikely soul-cleansing confession by the Plan's actuary.

One of the practical problems is that each of the factors which goes into the withdrawal liability calculation is the result of a process akin to an educated guess. The actuary sets assumptions for the Plan, but there is no objective yardstick to measure the fairness of the assumption. The statute contemplates issuance of regulations by the Pension Benefit Guaranty Corporation establishing reasonable actuarial assumptions and methods. 29 U.S.C. § 1393(a). A decade later, PBGC has not issued these regulations providing an objective measure of actuarial assumptions. As a consequence, in this case, as with most withdrawal liability cases, the Plan's actuary testifies that the assumptions he used were in the range which he determines to be reasonable. That "range of reasonableness" is frequently broad enough to be the difference between a plan with significant unfunded liability and one which may be teetering on the brink of overfunding. *See, Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund, Inc.,* 762 F.2d 1137 (1st Cir. 1985) (*en banc*) (Aldrich dissenting). (The interest rate assumption range of reasonableness was between 7.5% and 14.5%). Although the employer can present the views of another actuary, as in this case, the outcome of the conflict in testimony cannot overcome the burden imposed by the presumption.

Thus, as applied to calculation of the withdrawal liability, the

so-called rebuttable presumptions are, in fact, irrebuttable in the absence of a confession by the trust fund's actuary that his own analysis was unreasonable. At least one court has applied the *Valandis v. Kline, supra,* reasoning and concluded that presumptions of this sort are irrebuttable presumptions and an unconstitutional denial of due process. *See, Universal Restoration, Inc. v. United States,* 798 F.2d 1400, 1406 (Fed. Cir. 1986). Although *Universal Restoration* arises in a different context under a different statute, the burdens imposed under that statute are quite similar to those imposed upon withdrawing employers under this statute.

Another sub-issue worthy of this Court's attention is the solution if the Court agrees that the presumptions represent an unconstitutional denial of due process. In *Yahn & McDonnell,* the Third Circuit advocated treating the 29 U.S.C. § 1401(a)(3) presumptions as severable. Petitioner suggests that an equally reasonable approach would be to jettison both the 29 U.S.C. § 1401 (a) (3) presumption and the 29 U.S.C. § 1401 (c) presumption. Other solutions are also viable, but it is important that this issue also be resolved.

D. **Making a Determination on Whether a Complete Cessation of Operations was Permanent Based on Events Occuring Two Years After a Complete Cessation of Operations is Unfair And Unduly Disruptive of the Party's Expectations and Interstate Commerce.**

The primary focal point of the date of withdrawal issue is whether the 1979 cessation of all covered operations constituted "permanent cessation of covered operations" within the meaning of 29 U.S.C. § 1383. There is no factual dispute about what transpired from August 1979 through the withdrawal assessment in early 1982. There is a fundamental dispute over the impact, if any, of the events during 1981 on this determination. Consistent with Supreme Court Rule 10(c), the circumstances under which a withdrawal by complete cessation of operations occurs has not been resolved by this Court. It should be resolved at this time so that uncertainty on this issue does not unduly interfere with participation in multi-employer plans or decisions by employers like Concrete Pipe and Products to open new facilities.

The parties have been able to crystalize their respective approaches to this issue. Concrete Pipe and Products contends that the appropriate measure is one which examines the objective circumstances in place at

the time that the complete cessation of operations occurs. CLPT urges an approach through which the trustees apply a hindsight analysis under which they can ignore a cessation of covered operations for an indefinite period of time and make a determination on withdrawal at a time of its choosing, presumably maximizing the amount of withdrawal liability it can charge to the withdrawing employer.

Petitioner urges that the Ninth Circuit was wrong in endorsing CLPT's approach. First, the legislative history supports the fact that the entire purpose of MPPAA was to rapidly accelerate the point in time at which the unfunded vested liability can be charged against a withdrawing employer. As this Court noted in its extensive analysis of legislative history of MPPAA in *Nachman Corp. v. PBGC,* 446 U.S. 359, 361-362 (1980), and *PBGC v. R.A. Grey & Company,* 467 U.S. 717, 720 (1984), the purpose of MPPAA was to accelerate the assessment and collection of withdrawal liability. Second, the statutory scheme contains provisions for dealing with faked closings or fraudulent transactions to evade the assessment of withdrawal liability, 29 U.S.C. § 1369. Third the statute also contains provisions for accommodating and reducing withdrawal liability for those employers who suffer a complete withdrawal, but subsequently re-enter the plan. *See,* 29 U.S.C. § 1387. Indeed, PBGC's regulations contemplate that there can be a withdrawal by complete and permanent cessation of covered operations followed by a re-entry into the plan on more than two occasions in a 5½ year period. 29 C.F.R. § 2647.8(c).[5] Nothing in the statute or regulations supports the "wait and presume" approach used here.

This issue is one of true national importance, because of the impact on future decisionmaking by employers. It is relatively clear, here, that had Concrete Pipe and Products been able to foresee the withdrawal liability oddessy which lay ahead, it would either have added several hundred thousand dollars to its 1981 bid price to cover the withdrawal liability, manufactured the pipe in Sacramento and absorbed the transport costs, or simply not bid the job. All three of these consequences have a negative impact on interstate commerce. CLPT's theory for assessing withdrawal liability also provides a significant deterrent to those employers who may be contemplating the establish-

[5] This conclusion is drawn from the date on which the statute became effective (September 26, 1980), the nature of the regulation dealing with employers who withdraw and re-enter two or more times, and the promulgation of that regulation in March 1986, 51 Fed. Reg. 10300.

ment of operations at facilities which they had closed in the past.

In this case, CLPT reached out more than two years to conclude that a 1979 complete cessation of operations was, on 20-200 hindsight, not permanent. The message to employers is that the risk will inevitably exceed the benefits of attempting to establish operations in a community or site abandoned in the past. This outcome does nothing to increase participation in multi-employer plans, provide jobs, or facilitate the free flow of interstate commerce. The issues presented by the Ninth Circuit's affirmation of CLPT's hindsight approach to assessing withdrawal liability are substantial and present questions of national importance requiring resolution by this Court.

E. MPPAA Violates the Fifth Amendment Rights of Employers like Concrete Pipe and Products Where There is no Rational Connection Between the Expectation of the Parties and the Resulting Withdrawal Liability and None of the Unfunded Vested Liability in the Plan Can be Attributed to the Withdrawing Employer.

In *Connolly v. PBGC,* 475 U.S. 211 (1986), the Court's analysis dealt only with the facial challenge as emphasized by the concurring opinion of Justices O'Connor and Powell. That concurring opinion noted:

> Specifically, the court does not decide today and has left open in previous cases, whether the imposition of withdrawal liability under the MPPAA and of plan termination liability under the Employee Retirement Income Security Act of 1974 (ERISA) may in some circumstances be so arbitrary and irrational as to violate the due process clause of the Fifth Amendment. [cites omitted] The court also has no occasion to decide whether the MPPAA may violate the taking clause as applied in particular cases . . .

475 U.S. at 228. Justices O'Connor and Powell then describe a number of situations in which the constitutionality of the statute, as applied to particular employers, may violate due process. Petitioner suggests that the facts of this case provide an excellent opportunity to determine these issues regarding the constitutionality of the statute as applied to small withdrawing employers.

Concrete Pipe and Products was assessed withdrawal liability even though none of the unfunded vested liability of CLPT could be

attributable to Concrete Pipe and Products' employees. There is no dispute that CLPT's vesting schedule required at least ten years of service before benefits became vested. C.R. 124, Exhibit Jt. Ex. 7-E (Actuarial Valuation Certificate Ex. III). Concrete Pipe and Products' contributions to the plan began no earlier than December 1976, and ended for all practical purposes in October 1979, a period of less than three years.

The key factor in each of the different methods of computing withdrawal liability in 29 U.S.C. § 1391 is that it results in an allocation of the unfunded *vested* benefits of the Plan. It is unmistakable that CLPT's unfunded vested liability is attributable to employees of employers other than Concrete Pipe and Products because none of petitioner's employees had enough covered service to become vested in the Plan. As importantly, CLPT unilaterally increased the unfunded liability by ten percent in 1980 when it granted a ten percent benefit increase without an increase in contributions. Determining withdrawal liability based on the contribution ratio facts in this case is both arbitrary and irrational as applied.

As noted above, the Plan documents and the collective bargaining agreements all note that benefits are not guaranteed and that the employer's liability is strictly limited to the contribution amount contained in the collective bargaining agreement. It is also undisputed that Concrete Pipe and Products never played any role in the management of CLPT.

Concrete Pipe and Products submits that a withdrawal liability assessment in this case presents precisely the kind of violations of the taking and due process clauses about which the concurrence in *Connolly* was concerned. The undisputed evidence contradicts the possibility that a promise of definite benefits was made to any employees of Concrete Pipe and Products or any participant in CLPT. The evidence also directly contradicts any assertion that Petitioner agreed to guarantee the vested benefits provided to other employers' employees who participated in this Plan.

The computation of the withdrawal liability under 29 U.S.C. § 1391 retroactively, arbitrarily and irrationally takes property from Petitioner and denies Concrete Pipe and Products due process. There is nothing in Concrete Pipe and Products' conduct on this record which justifies the imposition of this kind of liability, particularly since none of

the unfunded vested liability can be attributable to Concrete Pipe and Products' employees.

The concerns expressed in the *Connolly* concurring opinion regarding the constitutionality of MPPAA as applied are amply demonstrated in this case. Justices O'Connor and Powell expressed concern that the imposition of retroactive liability on an employer for the benefit of other employers' employees could be arbitrary and irrational thereby violating the takings clause of the Fifth Amendment. Here, CLPT seeks to impose more than $190,000 in withdrawal liability against Petitioner even though this exceeds Petitioner's contribution and none of that liability is attributable to vested benefits owed to employees of Concrete Pipe and Products. The record is devoid of (1) guarantees by Petitioner to pay for the old debts of CLPT or (2) guarantees by either Concrete Pipe and Products or CLPT to the employees covered by the Plan that a certain level of benefits would be provided.

The *Connolly* concurrence also expressed concern that imposition of liability without regard to the extent of the employer's actual responsibility for the Plan promises (and whether those promises were conditional) might also violate the Fifth Amendment. This concern expressed in the abstract is precisely what occurred, in fact, in this case.

The Court is unlikely to be presented with a more clear fact pattern for determining whether assessment of withdrawal liability against an employer with no vested employees in the Plan is constitutional as applied. This issue is of significant national interest because the imposition of withdrawal liability on small businesses or newer businesses is a significant deterrent to entry into multi-employer plans, and particularly to those with significant amounts of unfunded liability.

Saddling small single employers who had no impact on the massive underfunding of this Plan with a withdrawal liability which far exceeds its total contributions is an arbitrary, irrational and unjust way to address the pension underfunding issue. Moreover, where this assessment cannot be rationally or logically traced to any conduct by the employer in either creating the underfunded nature of the Plan or in guaranteeing the benefits, the kind of due process concerns raised in the concurring opinion in *Connolly* become very real. Indeed, the concurring opinion has proved prophetic in that each of the concerns expressed about the harshness of outcomes in individual cases is presented in this dispute.

VI
STATEMENT PURSUANT TO SUPREME COURT RULE 29.4(b)

The constitutionality of MPPAA is drawn into question in this proceeding and neither the United States nor any department, office, agency, officer, or employee thereof is a party. Accordingly, 28 U.S.C. § 2403(a) may be applicable and this document is concurrently being served on the Solicitor General. Petitioner cannot verify that the Ninth Circuit provided notice below. Counsel for Petitioner was contacted by an attorney for PBGC during prior proceedings but has no knowledge of whether that agency notified the Solicitor General.

VII
CONCLUSION

Concrete Pipe and Products urges the Court to grant its Petition for Writ of Certiorari to resolve these unsettled questions involving multi-employer withdrawal liability under MPPAA.

DATED: November _____, 1991.

DIEPENBROCK, WULFF, PLANT
& HANNEGAN

By _____
JAMES M. NELSON
Attorneys for PETITIONER
CONCRETE PIPE AND PRODUCTS
OF
CALIFORNIA, INC.

APPENDIX

(a) Opinion by Court Whose Decision is Sought to be reviewed

(b) Other Opinions, Orders and Findings of Fact
- District Court Order, July 5, 1989
- Arbitration Decision I, August 26, 1987
- Arbitration Decision II, August 16, 1988
- District Court Order, March 19, 1984

(c) Order on Request for Rehearing

(d) Constitutional Provisions, Statutes, Regulations Involved in the Case

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Plaintiff-Appellee, v. CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC., Defendant-Appellant.	No. 89-55854 D.C. No. CV-82-5184-HLH **MEMORANDUM***

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding
Argued and Submitted May 6, 1991
Pasadena, California

Before: HUG, NORRIS, and LEAVY, Circuit Judges

We affirm the district court's decision. Whether Concrete Pipe and Products of California ("Concrete Pipe") withdrew from the employee benefits plan before the Multi-Employer Pension Plan Amendments Act Of 1980 ("MPPAA") was properly sent to arbitration. *See Teamsters Pension Trust Fund Bd. of Trustees of Western Conf. v. Allyn Transp. Co.*, 832 F.2d 502, 505 (9th Cir. 1987).

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

We affirm the arbitrator's calculation of withdrawal liability for the reasons stated by the district court.

Concrete Pipe's constitutional challenges to the MPPAA are controlled by *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986) and *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1400 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

Appellees are entitled to attorney's fees on appeal pursuant to 29 U.S.C. § 1132(g)(2)(D). *See Lads Trucking Co. v. Bd. of Trustees of Western Conf. of Teamsters Pension Trust Fund*, 777 F.2d 1371, 1375-76 (9th Cir. 1985).

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA Plaintiff v. CEN-VI-RO CONCRETE PIPE AND PRODUCTS Defendant	)	CV 82-5184 HLH CV 88-5759 HLH ORDER RE CROSS MOTIONS TO VACATE/ MODIFY/CONFIRM ARBITRATION AWARD

The motion of Concrete Pipe and Products Company of California, Inc. (hereinafter CPP), is treated as a petition to vacate the arbitration award, and is denied. The motion of Construction Laborers Pension Trust (hereinafter CLPT) to confirm the arbitration award is granted. To the extent that the motion to confirm the award seeks to "modify" the award, such is treated as a motion to vacate and is denied. The judgment is to be entered confirming said award, plus interest from the filing of case CV 82-5184, plus attorney's fees for the court litigation (but not the arbitration proceeding). CLPT is to submit the form of judgment.

This order will serve as the findings of fact and conclusions of law unless either party wishes more formal findings and conclusions, in which case, same shall be drafted by CLPT. Attorney's fees shall be claimed on the cost bill, with a supplementary declaration or declarations setting for the basis of the fees claimed. The Court adopts as its findings and conclusions the opinions of the arbitrator except as specifically set forth, and makes certain additional findings and conclusions herein.

1. PRIOR PROCEEDINGS IN THIS COURT

The Court adopts the legal conclusions of Judge Lucas in his determinations of 4/4/84. It is noted that the Ninth Circuit declined to consider an appeal as to those conclusions. With the rendering of final

judgment herein, those conclusions may now be reviewed (except, perhaps, as they have become moot).

2. CONSTITUTIONALITY OF MPPAA

The Court will not declare any of the provisions of MPPAA unconstitutional. While a district court can presumably reach a conclusion that a statute is unconstitutional in whole or in part, such is normally done by appellate courts who are charged with the necessary constitutional wisdom by virtue of their institutional position in the judicial hierarchy.

Furthermore, the Ninth Circuit has held constitutional many of the provisions of MPPAA which CPP challenges, with the implication being that the rest is also constitutional. *See Board of Trustees v. Thompson Building Materials,* 749 F.2d 1396 (9th Cir. 1984). Only one aspect of the Act has been declared unconstitutional. *See United Retail and Wholesale Employees v. Yahn & McDonnell, Inc.,* 787 F.2d 128 (3rd Cir. 1986), aff'd by divided court, 481 U.S. 735 (1987). While the affirmance got three votes in the Supreme Court, it did not get five and is thus not binding here.

The Ninth Circuit's decision in *Thompson* is, however, binding on this court (and on any three judge panel of the Ninth Circuit), and the Court will follow it. CPP argues that the facts of this case are distinguishable from those in *Thompson* on the grounds that the Ninth Circuit decision was premised on a factual conclusion that the trustees did not have a conflict of interest, while the trustees in the case at hand do. The Court rejects this line of reasoning. It does not read the *Thompson* as being limited to the specific facts of that case. To the extent that the arguments that the Trustees of CLPT have a conflict in making presumptively valid determinations has constitutional merit, such arguments should be presented to the Court of Appeals, presumably *en banc.*

3. WITHDRAWAL LIABILITY

The primary dispute between that parties is the date of withdrawal from the plan. Under MPPAA, an employer may be liable for complete withdrawal liability where it either: 1) permanently ceases to have an obligation to contribute under the plan; or 2) permanently ceases all covered operations under the plan. *See* 229 U.S.C. § 1383(a). The arbitrator concluded that the closing of the Shafter plant in late 1979-early 1980 (prior to the date of MPPAA effectiveness) was merely

temporary, as shown, *inter alia*, by the reopening of the plant in 1981, causing withdrawal liability to be created as of the date that CPP's obligation under its collective bargaining agreement ended.

A. Standard of Review

As noted above, the Court will not second guess Judge Lucas' determination that the date of complete withdrawal is a question to be decided in the first instance by the arbitrator. The factual finding of the arbitrator regarding the date of withdrawal from the plan is to be upheld unless it is against the "clear preponderance" of the evidence. *See* 29 U.S.C. § 1404(c). Presumably this means more than a mere preponderance and something less than a "clearly erroneous" standard.

CPP argues that a *de novo* standard of review is appropriate for all of the conclusions reached by the arbitrator with respect to the issue of liability. However, the Court believes that the more deferential standard of § 1404(c) must be applied to the findings of fact, including the factual inferences drawn from the facts by the arbitrator.

B. Permanence of Closing of Shafter Facility

The factual findings of the arbitrator regarding the date of withdrawal from the plan are not contradicted by a clear preponderance of the evidence. In challenging the findings of the arbitrator, CPP makes several assumptions which the court does not accept. CPP assumes that whether a business permanently ceases "all covered operations" under the plan is dependent only (or primarily) on its subjective intent when it closes a plant. It also assumes that only its intent with regard to the operation of a particular plant is to be considered. And, it further assumes that subsequent events may not be looked at in determining whether all covered operations have ceased. The Court agrees with none of these assumptions.

As to the intent at the closing of the plant, the Court does agree with CPP that such is not wholly irrelevant and is one fact to consider among many facts, but does not agree that such intent at a particular time is factually or legally determinative of the issue to the exclusion of other facts.

Here the evidence is consistent with the conclusion drawn by the arbitrator that CPP did not intend to permanently cease operations at the Shafter plant, but that CPP merely closed what was apparently at the time an uneconomical operation. When the plant again became economical, it was reopened for a period, thus demonstrating that the

closing was conditional. As powerfully set out by the arbitrator, CPP's retention of the site, the sending of salesmen into the area, and the negotiation and conclusion of a contract for which the plant was later reopened, all negate an intent to abandon permanently the covered operations at the Shafter plant. Thus, the arbitrator had sufficient basis to conclude that the date of cessation of the obligation to pay benefits (which was after the effective date of MPPAA) was the date of complete withdrawal.

CPP argues that the facts on which the arbitrator relied have other explanations. For example, CPP claims that the reason it continued to renew leases on the property was solely to avoid having to clear the site as required by its lease. The Court notes that this explanation is not wholly convincing, since renewal of the lease would only postpone the inevitable cost of clearance, assuming permanent cessation. More importantly, the conclusions of and the inferences drawn by the arbitrator are reasonable and support the decision, which is not contrary to the clear preponderance of the evidence, or indeed, contrary to a mere preponderance.

The fact that the plant was reopened when a favorable economic opportunity arose is itself strong evidence that it was not permanently closed, but only closed during the pendency of a particular economic condition. The Court will not interfere with the factual determination of the arbitrator.

CPP argues that the arbitrator's decision "does violence" to the statutory scheme of MPPAA. It points to 29 U.S.C. § 1387 (which allows waiver or reduction of liability where a withdrawing employer later reenters a plan). CPP concludes that this section proves that an employer may withdraw from a plan multiple times, and thus, that withdrawal must be determined on the date the plant was closed without reference to subsequent events. The Court rejects this line of reasoning. Section 1387 is designed to deal with a different problem: where liability is assessed, but the withdrawal turns out not to have been permanent. That situation is not presented by the facts at hand. In fact Section 1387 could be interpreted in a manner exactly contrary to CPP's analysis. That section may indicate that only withdrawals which turn out based on subsequent developments to have been permanent establish full liability under MPPAA.

Finally, the Court rejects the claim that its decision will result in

violation of the purposes of MPPAA. CPP asserts that acceptance of the "mothballing" theory will result in plans being strung along by an employer with claims that a cessation of covered activity is merely temporary. However, as noted above, the terms of MPPAA deal with the problem of withdrawals that appear permanent but later prove to have been temporary. *See* 29 U.S.C. § 1387. The obvious solution is to assess liability against such an employer and allow it to later move under Section 1387 for a recovery.

4. AMOUNT OF WITHDRAWAL LIABILITY

Both sides challenge the arbitration award as to the amount of liability. The CLPT asserts that the arbitrator erred in not including the contribution history of CEN-VI-RO (the prior owner of the facility in question, which sold the plant to CPP in 1976). CPP, on the other hand, claims that the actuarial assumptions used by the plan are unreasonable, that the sum assessed includes liabilities which were the result of a breach of fiduciary duty by CLPT, and that the trust ignored its actuary's policy with respect to discount rates where an employer pays in a lump sum.

A. CLPT's Claims

The Court rejects the trust's challenges to the amount of withdrawal liability. The Court agrees with the arbitrator that MPPAA does not mandate the consideration of the prior contribution history of CEN-VI-RO. *See* Arbitration Award of August 16, 1988 at pp. 10-17. 29 U.S.C. § 1384(b) is limited to situations where liability is escaped by a seller of covered assets under § 1384(a). Likewise, the doctrine of successor liability is inapplicable, since there was no notice that CPP would acquire MPPAA liability (the Act had not even been passed on the date of the acquisition).

B. CPP's Claims

The Court also rejects the challenges of CPP to the amount of liability. CPP earnestly insists that it is unconstitutionally unfair for an interested party to make a determination which binds its adversary and to have that determination given presumptive effect by the courts or arbitrators. However, the statute so provides, and, as set forth above, this has been approved by the Ninth Circuit. Thus, CPP has the burden of showing that the actuarial assumptions were "in the aggregate unreasonable" or that the "plan's actuary made a significant error in

applying the actuarial assumptions or methods. *See* 29 U.S.C. § 1401(a)(3).

The plan's actuary had the significant fortifying feature of being the most widely recognized in the field, with massive experience nationwide in advising pension trustees. CPP attacked the assumptions with an actuary of vastly less experience (in fact no experience with multi-employer trusts). While the use of any economic prediction factor can be debatable, the Court cannot say, or come close to saying, that the conclusions of the arbitrator are against the clear preponderance of evidence. The Court accepts the reasoning of the arbitrator in this respect and adopts his findings.

The Court also rejects the claim raised by CPP that the calculated liability includes amounts that are the result of violations of fiduciary duty by the trustees. CPP has no standing to complain about a trust policy that extended the amount of time necessary for vesting (to 15 years) and increased the pensions of already vested employees (by 10%). *See Ponce v. Construction Laborers Pension Trust of Southern California,* 774 F.2d 1401 (9th Cir. 1985). Furthermore, the *Ponce* case did not hold that the *increase* in the pensions was a breach of duty, but that the overly long vesting period was. Thus, the holding provides no support for CPP.

Finally, the Court does not accept the claim that the trust violated its own actuary's policy of calculating withdrawal liability at a higher discount rate where an employer is willing to pay in a lump sum. That policy is designed to lower liability where the trust is not required to accept interest rate and other economic risk because an employer pays its withdrawal liability completely up-front. CPP has not done so. In fact, to this day, it has not paid its liability and professes that it intends to delay so doing until it has a chance to appeal to the Circuit Court.

5. ATTORNEY'S FEES AND COSTS

CLPT is entitled to its fees and costs for the court work. *See Lads Trucking Co. v. Board of Trustee,* 77 F.2d 1371 (9th Cir. 1985)(trust entitled to fees in "action" under ERISA). However, MPPAA appears to leave the questions of attorney's fees incurred in an arbitration proceeding to the discretion of the arbitrator. *See* 29 U.S.C. § 1401(a)(2) (arbitrator may award reasonable attorney's fees). In this case, the arbitrator decided that each side should bear its own attorney's fees. Hence, CLPT may not recover those amounts with respect to the arbitration proceeding.

IT IS SO ORDERED.
DATED 7/3/89

HARRY L. HUPP
United States District Judge

American Arbitration Association

In the matter of Arbitration)
)
Between)
)
CONSTRUCTION LABORERS)
PENSION TRUST FOR)
SOUTHERN CALIFORNIA)
)
and)
)
CONCRETE PIPE AND)
PRODUCTS COMPANY, INC.)
_____)

DECISION OF ARBITRATOR

Kenneth M. Schwartz
Arbitrator
141 South Linden Drive
Suite 203
Beverly Hills, CA 90212
Telephone: (213) 274-9734

I

The Proceedings

This arbitration hearing is being conducted pursuant to an order of the United States District Court for the Central District of California wherein Judge Malcolm Lucas ordered the parties to arbitrate the dispute existing between them. The issues in this matter have been bifurcated with the threshold question to be decided of whether the Company has a withdrawal liability in the first instance. It was understood and agreed that should it be determined that the Company has incurred a withdrawal liability, then and in that event, the Company could, if it cared to do, so challenge the calculation of the amount of the liability in a subsequent hearing.

Counsel for the parties selected the undersigned to act as arbiter to resolve the dispute in accordance with the rules established by the American Arbitration Association.

Parties to the dispute are:

Concrete Pipe and Products Company of California, herein called "Company," and Construction Laborers Pension Fund, herein called "Fund."

Appearing as legal counsel for the parties were:

Dennis R. Murphy, Esq., of Diepenbrock, Wulff, Plant & Hannegan, for the Company

Everett G. Beers, Esq., of Cox, Castle & Nicholson, for the Fund.

The hearing was held on June 25, 1987, in the offices of the American Arbitration Association at Los Angeles, California. A stenographic record was made of the proceeding by a Certified Shorthand Reporter. All witnesses testifying in this arbitration were sworn as was the Arbitrator.

Counsel for the parties were afforded a full and complete opportunity to enter into stipulations, both oral and written; present documentary evidence; examine and cross-examine witnesses; make arguments in support of their respective positions; and file opening and closing briefs.

In a document received in evidence as Joint Exhibit 2, the parties submitted in evidence a Joint Stipulation of Facts as well as opinions and orders from both the United States District Court and The Court of Appeals.

For the purpose of this proceeding, the Stipulation of Facts will not be repeated in *haec verba,* but reference will be made to facts relevant to the resolution of this matter. References may also be made to the District Court's comments as well, as they may be material.

II

The Factual Background

Prior to December 1, 1976, Cen-Vi-Ro, a manufacturer of concrete pipe in Shafter, California, and the Southern California District Council of Laborers, herein called "the Union," were signatories to a Collective Bargaining Agreement which, among other things, obligated the Employer to make payments to the Fund on behalf of employees covered by the Agreement.

On December 1, 1976, the Company, i.e., Concrete Pipe, acquired by purchase the Shafter, California, plant and took over the operation of the production of concrete pipe. As a result of the acquisition of the plant, the Company assumed the Collective Bargaining Agreement of its predecessor and continued to abide by its terms, including making contributions to the Fund.

In 1978, the Company and the Union entered into a new Agreement which, by its terms, required contributions to be made to the Fund for employees for hours worked at the Shafter facility. By its terms, the Agreement was to remain in effect until June 30, 1981. It further provided for automatic renewal from year to year unless either the Union or the Company gave timely written notice of a desire to renegotiate its terms prior to June 30, 1981, or prior to June 30th of each subsequent year of the automatic renewal. It further provided that such written notice shall be given sixty (60) days prior to June 30, 1981, or subsequent June 30th of each year, and if no agreement was reached by June 30, 1981, or thereafter, the Employer or Union could give written notice to each other that on a " . . . specified date not less than fifteen (15) days after the date of said notice, the Agreement shall be considered terminated."

Up until August 1979, the Shafter plant was in full and continuous production of concrete pipe. In August 1979, the Company ceased its production of concrete pipe at Shafter. Further, it stopped purchasing materials; it laid off employees; and started removing machinery for shipment to its Sacramento plant. From October 1979 to the reopening of its plant in November 1981, only two employees worked at the

Shafter plant, one of whom worked from October 1979 through December 1980, and the other worked from November 1979 to the reopening in November 1981. The last contribution made by the Company to the Fund was in May 1980.

Throughout the period of August 1979 through November 1981, the Company searched for additional work in the Shafter-Bakersfield area by sending its salesmen into the area on a regular basis.

In the latter part of 1981, the Company became a successful bidder on a project in the Bakersfield area, known as Wheeler Ridge. As a result of such bidding, the Company was awarded two of the four contracts it bid on calling for the production of 7,000 tons of concrete pipe.

As a consequence of receiving the two contracts, the Company reopened its Shafter plant in November 1981 and employed persons within the classifications of laborers covered by the scope of the 1978-1981 Collective Bargaining Agreement.

In the Spring of 1981, and prior to the Company being awarded its newly bid upon contracts, both the Company and the Union sent timely notices to each other in accordance with their Agreement, giving notice to each other of their desire to negotiate a new bargaining agreement. Negotiations were conducted in October and November 1981. On November 30, 1981, the Company sent the Union a letter stating that the Company was withdrawing recognition of the Union and that an impasse in negotiations had been reached. Said notice sent to the Union of the Company's intended termination of the Agreement was pursuant to the notice provision of the Agreement and which would be effective as far as the date of termination was concerned no earlier than December 15, 1981.

III.

The Factual Question to be Determined

In order to determine whether or not there is a withdrawal liability to the Fund by the Company, the determination of the status of the closing down of the Shafter plant is paramount.

Judge Malcolm Lucas Phrased the question as follows:

> "Did Concrete Pipe permanently close its Shafter plant in 1979, as Concrete Pipe maintains, or did it, as the Pension Trust argues, simply 'mothball' the facility pending its relocation elsewhere in the Union's jurisdiction or pending an increase in business such as apparently occurred in 1981?"

IV

Contentions of the Parties

The Company contends that it is not liable for withdrawal liability because it effected a "complete withdrawal" when it closed its Shafter plant in August 1979 which date is prior to September 26, 1980, the effective date of MEPPA. It is the contention of the Company that the closure of the Shafter plant in August 1979 constituted a permanent cessation of covered operations as that term is defined in MEPPA; hence, the provisions as to withdrawal liability are not applicable to it. Further, the Company contends that Congress recognized the fact that a Company which had permanently ceased a covered operation could reopen at a later time when Congress provided for adjusting the withdrawal liability when such incident occurred (29 U.S.C. § 1387 of ERISA).

The Fund contends that 29 U.S.C. § 1381(a) requires a permanent cessation of covered operations before a "complete withdrawal" occurs and that the temporary idling of the plant in 1979 did not qualify as a complete withdrawal because the plant later went back into full production for a substantial period of time. Hence, the Fund contends that a "complete withdrawal" did subsequently occur on December 15, 1981, the date the Company terminated its agreement with the Union and ended its obligation to contribute to the Fund.

V

Statement of the Law

The applicable provisions of the law are found in 29 U.S.C. § 1381, *et seq.*, which deal with withdrawal liabilities from multi-employer plans after September 26, 1980, and are as follows:

1. 29 U.S.C. § 1383(a) defines "complete withdrawal" as:

> "(a) For purposes of this Part, a complete withdrawal from a multi-employer plan occurs when an employer —
>
> "(1) Permanently ceases to have an obligation to contribute under the plan, or
>
> (2) permanently ceases all covered operations under the plan."

While there are certain modificatons applicable to the Building and Construction Industry and the Entertainment Industry, there was no contention made by either of the parties that said modifications were relevant here.

2. 29 U.S.C. § 1383(e) fixes the date that a complete withdrawal occurs as follows:

> "(e) For purposes of this part, the date of complete withdrawal is the date of cessation of the obligation to contribute or the cessation of covered operations."

3. 29 U.S.C. § 1392(a) provides:

> "(a) For purposes of this part, the term 'obligation to contribute' means an obligation to contribute arising —
>
> "(1) Under one or more collective bargaining (or related) agreements or
>
> "(2) As a result of a duty under applicable labor-management relations law, but does not include any obligation to pay withdrawal liability under this Section or to pay delinquent contributions . . . "

VI
Discussion

Counsel for the parties have no disagreement as to the facts nor have they any disagreement as to the applicable law involved.

The issue to be determined is whether or not the Company met the definition of "complete withdrawal" when it closed its plant in Shafter, California, in August 1979. Judge Lucas in posing the question simply asks the question of whether the closure in 1979 of the Shafter plant was permanent or merely a "mothballing" of the plant; in other words, a temporary situation.

Counsel for the Company notes that the facts presented strongly support the contention that the Company *intended* the closure to be of a permanent nature. In his argument to support his position further, counsel points out that attempts were made to relocate the plant and also to negotiate out of the Company Lease, which counsel contends are facts consistent with the intention to permanently cease operations.

The dictionary definitions are not of a great deal of help in determining the issue here. While Webster's Dictionary does define "permanent" as "lasting indefinitely" and further Webster defines the word "indefinite" by using the term as having "no precise limits," nonetheless, Webster also defines "permanent" as "lasting *indefinitely without change*" (emphasis mine). Black's Law Dictionary defines "permanent" as "*fixed, continuing, lasting, stable, enduring, not subject to change* but *not necessarily perpetual* (emphasis mine). Frankly, the

definitions do not resolve the issue, but simply lends itself to interpretations as to what length of time must elapse before a "temporary" closing becomes "permanent." The very fact that the word "indefinite" is defined in Webster's Dictionary as having "no precise limits" is indicative of the ambiguity which exists when trying to apply the strict definitions to the facts.

Needless to say, when making the determination as to whether a "complete withdrawal" has occurred, the test to be applied is an objective test. The expression of intent to withdraw is irrelevant to the determination of actual withdrawal. *IAM National Pension Fund Benefit Plan C v. Stockton TRI Industries,* 727 F.2d 1204 (DC C.A. 1984). Hence, the overt manifestation of the acts of the Company is the determining factor.

In the instant case, there were documents and testimony in support of the Company's contention that the closing in August 1979 was intended by the Company to be a permanent closure. Notwithstanding the Company's intent, the plant was reopened for full production in November 1981 which negates a determination of permanent cessation of operations.

Both counsel have cited the case of the *United Food and Commercial Workers v. G. Bartusch Packing Co.*, 546 F.Supp 852 (1982) in support of their respective positions. Accordingly, an analysis of the case is warranted.

In *Bartusch*, the Employer had shut down his operation prior to the effective date of MEPPA. At the time of the closure, all the employees were laid off indefinitely. It was conceded that the Employer intended the closure to be temporary in that he hoped to obtain appropriate financing to reopen the plant and resume operations. The Employer's attempts to obtain financing were unsuccessful and as a result thereof, the plant never reopened and the employees were never rehired.

The Pension Plan argued that since the Employer had not intended the closure to be permanent but in fact intended it to be temporary, the complete withdrawal had not occurred prior to the effective date of MEPPA; hence a withdrawal liability was incurred.

The Court disagreed with the argument of the Pension Plan when it held that the intent of the Employer was irrelevant in determining whether a permanent cessation of covered operations occurred. The

Court stated:

> "Regardless of its intention . . . the failure of the plant to ever reopen means that the initial closing was permanent" (*Id.*, at 857).

Counsel for the Fund in the instant case has relied on the *Bartusch* case in support of his argument that intent is immaterial and the cold facts are that the Company did reopen its plant for full production in November 1981.

On the other hand, counsel for the Company looks to the *Bartusch* case in support of his argument that a "permanent cessation of covered operations can occur even if an employer has the ability and even the intent to reopen."

In reading the *Bartusch (supra)* and *Stockton TRI Industries (supra)* cases, it appears convincing to the undersigned that the intent is irrelevant and the objective test to determine when the complete withdrawal has occurred is the standard to be used.

While there was considerable evidence to the effect that the Company had attempted to locate a new plant in the San Bernardino-Riverside area, nonetheless, there was also evidence to the effect that two employees worked at the Shafter location at such duties as acting as plant custodian, plant security and answering calls regarding the unsold inventory. Further, the Company renewed its Lease for an additional year. Still further, there is evidence that during the period of the closure from August 1979 to November 1981, salesmen were in the Shafter-Bakersfield area attempting to obtain orders for work.

Last, but not least, the fact that the Company bid on four (4) contracts and were awarded two (2) contracts for the production of concrete pipe resulting in the plant reopening and employing persons within the classifications of laborers covered by the scope of 1978 to 1981 is a fact that cannot be ignored in imposing the objective test in determining when a complete withdrawal occurred.

Parenthetically, the fact that the Company gave notice to the Laborers' Union in the Spring of 1981 of its desire to renegotiate the Collective Bargaining Agreement for the Shafter plant is wholly inconsistent with the Company's position that there was a cessation of covered operations at the time the Shafter plant closed in August 1979.

VI
Conclusion

It is concluded, therefore, that based upon the objective facts and in answering the factual question raised by Judge Malcolm Lucas, it is found that:

> Concrete Pipe did not permanently close its Shafter plant in 1979 but simply "mothballed" the facility pending an increase in business as a result of which it reopened its plant and hired employees in classifications covered by the Labor Agreement. Accordingly, Concrete Pipe is liable under MEPPA for withdrawal liability.

Dated August 26, 1987

KENNETH M. SCHWARTZ
Arbitrator

PROOF OF SERVICE BY MAIL

I am over the age of eighteen years and not a party to this action. I am employed in Los Angeles County at Cox, Castle & Nicholson, 28th Floor, 2049 Century Park East, Los Angeles, California 90067, which is the office of a member of this court's bar at whose direction I served the following document(s).

On November 18, 1987, I deposited document(s) in the United States mail at Los Angeles, California, sealed in an envelope(s) with full postage prepaid.

The document(s) was entitled:
Status Report on Arbitration Proceedings

The envelope(s) was addressed to:
Dennis R. Murphy
Diepenbrock, Wulff, Plant & Hannegan
300 Capitol Mall, 17th Floor
Sacramento, California 95814

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

November 18, 1987 Irene L. Tetreault

AMERICAN ARBITRATION ASSOCIATION

In the matter of Arbitration	)	
	)	No. 72-621-0001-87
Between	)	MEPPA
	)	
CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA	)	
	)	
and	)	
	)	
CONCRETE PIPE AND PRODUCTS COMPANY OF CALIFORNIA	)	

DECISION AND AWARD

of

KENNETH M. SCHWARTZ
Arbitrator

Dated: August 16, 1988

Introduction

This is the second phase of a bifurcated arbitration proceeding between Construction Laborers Pension Trust Fund for Southern California ("Trust") and Concrete Pipe and Products Company of California ("Concrete Pipe"). This proceeding was conducted pursuant to an order of the United States District Court for the Central District of California and was in accord with Section 4221 of the Multi-Employer Pension Plan Amendments Act of 1980 (MEPPA). The hearing was held in Los Angeles, California, in the offices and under the auspices of the American Arbitration Association on February 18, 1988.

Counsel appearing for the Trust were Cox, Castle & Nicholson, by Everett G. Beers, Esq.

Counsel appearing for Concrete Pipe were Diepenbrock, Wulff, Plant & Hannegan, by James M. Nelson, Esq.

The dispute between the parties arose out of the attempts of the Trust to seek an award upholding its assessment of withdrawal liability on Concrete Pipe in the principal amount of $268,168.81.

The first phase of the arbitration hearing was held in Los Angeles, California, on June 25, 1987. As a result of said hearing, this Arbitrator issued his Award on August 27, 1987, at which time he concluded that the withdrawal of Concrete Pipe was covered by MEPPA and that Concrete Pipe would be liable for payment of its share of unfunded vested liability of the Trust Pension Plan when it withdrew from the Plan in 1981.

In this second phase of this proceeding, the issue to be resolved by the Arbitrator is the amount of withdrawal liability due the Trust based upon the applicable law.

I

Facts Pertinent to Resolution of the Amount of Withdrawal Liability

The parties to this proceeding had entered into a stipulation of facts in the District Court proceeding docketed as *Construction Laborers Pension Trust For Southern California v. Concrete Pipe of California,* Case No. CV 82-5184.

For purposes of convenience, the relevant paragraphs of said stipulation are summarized and set forth below:

Concrete Pipe is a California corporation doing business within the Central District of California; the Trust is an expressed Trust

organized under the Labor-Management Relations Act of 1947, as amended; that said Trust is an express Trust formed under a Trust Agreement entered into among the Southern California District Council of Laborers ("Union") and several multi-Employer associations; that said Trust primarily covers employees in the building and construction industry and is managed by a Board of Trustees, half of whom are selected by the Union and the other half selected by the multi-Employer associations.

The Trust derives revenues from Employer contributions made by Employers bound to Collective Bargaining Agreements with the Union; these Collective Bargaining Agreements require signatory Employers to make contributions to the Trust for each hour worked by employees within the bargaining units covered by the Collective Bargaining Agreements involved.

Cen-Vi-Ro and the Union (as well as the affiliated Local 220 located in Bakersfield) were signatories to such a Collective Bargaining Agreement prior to November 30, 1976, covering terms and conditions of work (including Trust coverage) of employees represented by Local 220 at the Shafter Plant.

On and before November 30, 1976, a plant for the manufacture of concrete pipe located at Shafter, California, was owned by Cen-Vi-Ro and as of December 1, 1976, this plant became owned by Concrete Pipe and has been owned by it at all times since that date.

On December 1, 1976, and thereafter, Concrete Pipe honored the terms of the Collective Bargaining Agreement between Cen-Vi-Ro and the Union which expired in 1978. On November 27, 1978, Concrete Pipe entered into a new Collective Bargaining Agreement with the Union which likewise provided for contributions to the Trust for each hour worked by employees within the bargaining unit covered by the Collective Bargaining Agreement. This Agreement contained provisions in respect to the appropriate notices to be given by the parties to each other in respect to terminating the Agreement.

Pursuant to the Trust Fund contribution provisions of the new Agreement signed by the Union and Concrete Pipe on November 27, 1978, and the Trust Fund contributing provisions of the Agreement between Cen-Vi-Ro and the Union that Concrete Pipe had honored since December 1, 1976, Concrete Pipe had paid the Trust $102,656.68.

On April 21, 1981, the Union sent the appropriate notice of

reopening of the Labor Agreement for negotiations, as did Concrete Pipe likewise on May 1, 1981.

For reasons not material to this phase of the proceedings, negotiations broke down resulting in an impasse between the parties.

On August 17, 1979, Concrete Pipe ceased production at the Shafter Plant.

For hours worked in May 1980, Concrete Pipe contributed $48.60 to the Trust. That was the last contribution of Concrete Pipe to the Trust.

On January 20, 1982, the Trust notified Concrete Pipe of its alleged withdrawal liability of $268,168.81 and demanded payment with a prescribed schedule.

Concrete Pipe has not made any payment on the alleged withdrawal.

Concrete Pipe has not been financially incapable of paying any scheduled benefit to any of its beneficiaries.

The Trust has been informed by its independent actuary, The Martin E. Segal Company, Inc., that as of December 31, 1981, it had an aggregate unfunded vested liability of *$532,621,400*; that as of December 31, 1980, it had an unfunded vested liability of *$514,181,200*; and that as of December 31, 1979, it had an unfunded vested liability of *$493,322,600*. (The stipulation shows as of December 31, 1979, an aggregate unfunded vested liability in the amount of *$532,621,400*, whereas Exhibit "F" to the stipulation, entitled "Report on Employer Withdrawal Liability," shows in Section II, entitled "The Plan's Withdrawal Liability Pools," the amount as of December 31, 1979, to be *$493,392,600*.)(Emphasis mine)

No shareholder, officer, director, agent or representative of Concrete Pipe has, during the period from 1976 to the present date, had any participation in:

(a) the investment decisions pertaining to the assets of the Trust;

(b) the decisions of the Trust to adjust Pension Benefit levels;

(c) the decisions affecting the Trust's administrative costs; or

(d) the selection of actuarial assumptions or methods upon which Concrete Pipe's asserted withdrawal liability

has been calculated.

The Trust's decisions are made by the Trustees. At no time did Concrete Pipe choose to apply for membership or belong to any of the multi-Employer Associations who select one-half of the Trustees on the Board of Trustees, nor had Concrete Pipe ever been denied membership in said Associations.

II
Contentions of the Parties

A. **Concrete Pipe contends that:**

1. The actuarial assumptions and methods used in computing its withdrawal liability were not reasonable in the aggregate; moreover, the computations contained significant errors in the application of the actuarial assumption, used such as:

(a) accrual of contributions from other Employers in assessing Concrete Pipe's withdrawal liability;

(b) incorrect application of Trust's own actuarial standards in computing the withdrawal liability; and

(c) use of actuarial assumptions which are unreasonable when considered individually and result in the over-all actuarial assumptions and methods being unreasonable in the aggregate.

2. Presumption contained in 29 U.S.C. Section 1401 that the decisions by the Trust and the Trust Fund's actuary are presumed correct result in an unconstitutional deprivation of due process. Further, that the preponderance of the evidence establishes that the withdrawal liability determination is clearly erroneous.

3. There are reasonable actuarial assumptions which can be applied to this case which would result in reducing the withdrawal liability to $41,523.15.

B. **The Trust contends that:**

1. The two-tiered Segal method of calculating the Trust's unfunded vested liability was based in the aggregate, on reasonable actuarial assumptions, and therefore the Trust's determination of the amount of withdrawal liability should be upheld.

2. The Trust's actuarial assumptions made in accounting for unrecorded past service credit were reasonable, having been based on an objective and statistically significant survey.

3. Requiring a withdrawing Employer to pay the same share of the Plan's unfunded vested liability (exclusive of interest) regardless of whether it pays in a lump sum or in installments is reasonable.

4. The presumption in favor of the Trust that requires a withdrawing Employer to carry the burden of proof that Trust's determinations are unreasonable is simply a constitutional allocation of burden of proof to Employer in withdrawal liability cases; hence, in order to defeat Trust's calculations, Concrete Pipe has burden of showing that the determination was "unreasonable or clearly erroneous."

5. When Concrete Pipe purchased Cen-Vi-Ro and continued its obligation to contribute to the Trust, Concrete Pipe inherited Cen-Vi-Ro's contribution history; hence, is liable for the full share of withdrawal liability, plus accrued interest.

III

Analysis, Discussion and Conclusions

A. Constitutionality of 29 U.S.C. § 1401(a)(3)(A).

Concrete Pipe has raised the question of the constitutionality of the presumption in 29 U.S.C. Section 1401(a)(3)(A). The argument made is that the section is void because it "unconstitutionally" violates Concrete Pipe and Products' right to an impartial decisionmaker, and hence, its right to procedural due process of law.

While the arguments made by counsel for Concrete Pipe are thought provoking, nonetheless, this Arbitrator shares the view of counsel for the Trust as to what the arbitrator's role is in this proceeding. It is clear that the question of constitutionality of statutory provisions should be adjudicated in court proceedings. As pointed out by the court in *Republic Industries v. Central Pennsylvania Teamsters Pension Fund,* 693 F.2d 290, 296 (3rd Cir. 1982):

> "(T)he legislature could not have intended to defeat separation of powers principles by allowing an administrative tribunal to review the constitutional validity of a statute — a function reserved for the judiciary. It would be unconstitutional, therefore, to compel the arbitrator to review the facial constitutionality of MPPA."

It should be noted that the matter of the constitutionality of the statutory provisions of ERISA presumption was upheld by the Ninth

Circuit Court of Appeals in the case of *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials,* 749 F.2d 1396; *cert. denied,* 471 U.S. 1054. It is recognized that the Third Circuit in the case of *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.,* 787 F.2d 128, held the presumption of correctness to be unconstitutional. Notwithstanding the *Yahn* case, the law in California, being in the Ninth Circuit, is as stated in the *Thompson* case, *supra,* decision, namely, that the provisions of Section 1401 are constitutional.

This Arbitrator is fully in accord with the decision of the court in the *Republic Industries* case, *supra*; hence, believes that the issue of constitutionality of the statute is for the Federal Courts and not the Arbitrator.

B. Whether Concrete Pipe When it Purchased Cen-Vi-Ro's Business and Continued Cen-Vi-Ro's Obligation to Continue to the Trust, Inherited Cen-Vi-Ro's Contribution History and, Hence, Became Liable for its Full Share of Withdrawal Liability of $268,168.61, Plus Accrued Interest.

The Trust contends that Concrete Pipe inherited the contribution history for 1976, the year in which it purchased Cen-Vi-Ro and is, therefore, liable for its full share of withdrawal liability as indicated herein. The Trust relies upon the express words found in the statute in Section 1384(b) in support for its position. Said Section provides:

> "(T)he liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years."

The argument by the Trust is that, in the instant case, Concrete Pipe inherited the contribution history for 1976, the year in which the purchase took place.

Furthermore, the Trust argues, even if the express words of MEPPA did not so provide, Concrete Pipe would nevertheless be liable under the labor law "successorship doctrine."

The reliance of the Trust on Section 1384, in the opinion of the Arbitrator, is misplaced.

The provisions of MEPPA as they relate to withdrawal liability of employers withdrawing from multi-employer pension plans is applicable to all employers withdrawing from such plans on or after September 26, 1980. Under the provisions of the Act, the employer who withdraws from the plan is liable to the plan for the employer's allocable share of the plan's unfunded vested benefits. The unfunded vested benefits are defined as the difference between the assets of the trust and the current discounted value of all vested benefits eventually to be paid participants.

The Purchase and Sale Agreement between Cen-Vi-Ro and Concrete Pipe negotiated in 1976 is obviously not in compliance with the provisions of 29 U.S.C. Section 1384, for the purposes of shifting the liability from the seller to the purchaser. The Purchase Agreement having been entered more than four (4) years prior to the enactment of the statute, there was no way for the parties to anticipate the statutory provisions. The Purchase and Sale Agreement did not provide for or require the purchaser to contribute to the Trust; nor did it compel the purchaser to post a bond or ensure that Cen-Vi-Ro was secondarily liable for withdrawal liability in the event Concrete Pipe withdraws as is provided for in 29 U.S.C. Section 1384.

Concrete Pipe's contention that Congress provided by statute in Section 1384 an exclusive mechanism for shifting liability as described herein has much merit.

In *Continental Inc. and Bakery Workers Pension Fund,* 5 EBC 1326 at 1336, Arbitrator Mittelman concluded that silence of the statute with respect to the pre-MEPPA sales of assets "is not an invitation to arbitral and judicial creativity" and that it must be regarded as "evidence of congressional intent to preclude its application." It is a conclusion with which this Arbitrator agrees.

An analysis of Section 1384 regarding conditions under which a seller's obligation to contribute and its contribution history is spelled out in the Section: In December of 1982, the PBGC concluded that this section of the statute provided the exclusive method by which a seller may avoid withdrawal liability by transferring its obligation to an arms-length purchaser.

In the *Continental* case, *supra*, at 1337, the Arbitrator states, "One simply must assume in the absence of even a glimmer in the legislative history of the Act indicating an assumption or belief that other

principles of successorship might be applicable, that Congress intended and believes that Section 4204 provided the exclusive method of and criteria for applying successorship principles to *bona fide* arms-length sales of assets cases."

Hence, the refusal of Congress to provide for an automatic transfer of withdrawal liability must be construed to preclude the transfer of Cen-Vi-Ro withdrawal liability to Concrete Pipe.

The language found in *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134 (1985), may very well be depositive of the issue, where the Court held:

> "We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19, 62 L.Ed.2d 146, 100 Supreme Court 242 (1979): '(W)here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' (Cite omitted) 'The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme, including an integrated system of procedures for enforcement.' (Cite omitted)" 473 U.S. 148.

The second contention of the Trust relates to the labor law doctrine of successorship.

Concrete Pipe points out, and properly so, that the only published decisions which have discussed the applicability of the "successor employer doctrine" as it relates to withdrawal liability have been rejected. The cases cited by Concrete Pipe in support of its contention of the inapplicability of the "successorship doctrine" are: *Richland Industries Ltd v. Robins,* 617 F.Supp. 639 (N.D. Illinois 1985); *Paperworkers Local 286 Pension Plan and Kardon Industries, Inc.,* 6 EBC 2398 (1985); *Superior Pocahontas Inc. v. Island Creek Coal Co.,* 657 F.Supp. 796 (S.D. W.Va. 1987).

The Trust's contention in respect to the "successorship doctrine" finds no support in court cases. The following citation from the *Massachusetts Mutual Life Insurance Company v. Russell* case, *supra,* 473 U.S. at 146, " . . . the assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking interrelated and independent remedial scheme which is in

turn part of a comprehensive and reticulated statute," makes it clear that Congress did not intend to imply a remedy not specifically spelled out in the statute.

In the labor law field, the successorship cases relied upon by the Trust are: *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964); *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972); *Golden State Bottling Co. v. NLRB,* 414 U.S. 168 (1973); *Howard Johnson Co. v. Hotel Employees,* 417 U.S. 249 (1974), as well as the *Fall River Dyeing and Finishing Corp. v. NLRB,* 96 L.Ed.2d 22 (1987).

The court in the above-cited cases basically held that if it finds the employer to be a successor, then the successor assumes the obligation of bargaining collectively with the employees' representative which, of course, is quite different from assuming the Collective Bargaining Agreement of its predecessor.

For Concrete Pipe in order to be liable for the obligations of Cen-Vi-Ro, it would have to be shown that Cen-Vi-Ro, at the time of the transfer, had such an obligation in the first instance. To reiterate, the transfer of ownership took place in 1976, long before the enactment of MEPPA. Since Cen-Vi-Ro had no such withdrawal liability at the time of the transfer of ownership, no such transfer of liability to Concrete Pipe could take place.

In summary, since contractual liabilities under the successorship doctrine, as enunciated in *John Wiley & Sons v. Livingston, supra,* and *Golden State Bottling Co. v. NLRB, supra,* and others cited, are not applicable since the court did not require the parties to abide by the terms and conditions of the Labor Agreement, to which it had not agreed (unless it could be shown that the employer had actual notice and could have protected himself against such liability). In any event, for the reasons enunciated in *Richland Industries Ltd., supra,* it is concluded that the cases governing successor employers in labor cases have no application in ERISA cases.

As was pointed out in the *Richland Industries* case, at page 641, "A new employer, in other words, may be a successor for some purposes and not for others." The court further states, "In particular, Section 1384 of ERISA clearly establishes that a purchaser of assets may not be held liable for the seller's contribution history, absent a special arrangement with the seller by which the purchaser voluntarily assumes the liability."

It is clear that there could have been no voluntary arrangement between the seller, Cen-Vi-Ro, and the purchaser, Concrete Pipe, since neither party in 1976 was aware of a liability which was in the future to be known as withdrawal liability.

Accordingly, it is concluded that based upon the reasoning above, Concrete Pipe did not inherit the one-year contribution history of Cen-Vi-Ro when Concrete Pipe acquired ownership of the plant in 1976; hence, it is not liable for the share of withdrawal liability which was included by the Trust in its original calculation.

The contention by the Trust that the issue of Cen-Vi-Ro's contribution was not timely raised is without merit. There is sufficient evidence in the record to show that the issue was raised in at least 1982 and thereafter. In the instant phase, the ultimate issue to be resolved is the *amount* of Concrete Pipe's withdrawal liability to the Trust; accordingly, the matter of Cen-Vi-Ro's contribution is properly before the Arbitrator.

In its Closing Brief, the Trust has attached as Exhibit A the monetary consequence of a holding that one year of contribution be eliminated by recomputing the withdrawal liability. The adjusted withdrawal liability, taking into account the exclusion of the one year of Cen-Vi-Ro contribution history, reduces the withdrawal liability of Concrete Pipe to $190,465.57. Incidentally, Concrete Pipe, in its Reply Brief of May 27, 1988, acknowledges the correctness of the amount as recomputed.

C. Were Actuarial Assumptions and Methods Reasonable in the Aggregate?

The statutory standards for reviewing the correctness of the actuarial calculations and assumptions are set out in 29 U.S.C. 1393(a)(1) and 1401(a)(3).

Section 1393(a)(1) provides, in pertinent part:

> "Withdrawal Liability under this part shall be determined by each Plan on the basis . . . actuarial assumptions, which, in the aggregate are reasonable taking into account the experience and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the Plan."

Further, Section 1401(a)(3) provides:

> "(A) For purposes of any proceeding under this section, any determination made by a Plan sponsor under

Sections 1381 through 1399 of this title and Section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

"(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a proponderance of the evidence —

"(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the Plan and reasonable expectations), or

"(ii) the Plan's actuary made a significant error in applying the actuarial assumptions or methods."

In the case of *Michigan UFCW/Food Employers Pension Fund v. Eberhard Foods, Inc.*, 831 F.2d 1258 (6th Cir. 1987), the court upheld the Arbitrator's decision that the interest rate (6%) was not unreasonable. It held:

"The burden of proof is on the employer. In meeting the burden, the test is not which withdrawal determination is the most reasonable but rather whether the challenged determination is unreasonable or clearly erroneous."

In recognizing the fact that actuaries may have different opinions, the court in *Eberhard, supra,* stated at page 1261:

"As the First Circuit observed in *Keith Fulton & Sons v. New England Teamsters,* 762 F.2d 1137 (1st Cir. 1985), the actual determination of withdrawal liability is not an exact science and therefore there is a range of reasonable actuarial determination of withdrawal liability (citation) Eberhard's actuary acknowledged this point, stating, 'I don't think there is a single answer as to reasonableness.' (citation) The statute does not anticipate that the actuary will always choose as the most reasonable from among the range. Rather, the only requirement is that in every case the actuarial determination will fall within the range of reasonableness . . . taking into account the unique characteristics of the Fund."

As pointed out by the Trust, all the Circuits with the exception of the Third Circuit in *United Retail v. Yahn,* 787 F.2d 128 (3rd Cir. 1986), have upheld and enforced the presumption.

In the instant case, the Martin E. Segal Company, the Trust's actuary, in calculating withdrawal liability used a method which takes into account a withdrawing employer's contributions to the Trust for a period of ten (10) years relative to the contributions of all other employers. The withdrawing employer is responsible for a proportional share of the Trust's "unfunded vested benefits" as that term is defined in Section 4213(c), i.e., as the value of nonforfeitable benefits under the Plan, less the value of assets of the Plan.

The Martin E. Segal Company has developed through the years a method which provides for two distinct interest rates. The method is sometimes referred to herein as the "two-tiered" method. The rates used under the Segal method are (1) the interest rates published by the PBGC for single employer plan terminations, and (2) the interest rate used by a pension plan for its funding valuation.

As between the two rates, the PBGC rate is fairly high while the rate for funding the Plan is relatively low.

What this method does is to provide for a blending of the two rates to arrive at the value of the nonforfeitable benefits.

To the extent that the market value on hand covers the liability, the investment return developed by the PBGC for single employer terminations would be applicable to determine the coverage provided by those current assets. In the instant case, as of December 31, 1980, and December 31, 1981, the corresponding investment return assumptions were 9.25% and 8.50%.

To the extent the unfunded vested liability cannot be covered by the current assets (as is the case herein, where only one-third of the liability could be covered by the current assets), the remaining liability is determined by using the investment return rate of 6.0%, which is the same investment return rate assumption used by the Trust for funding purposes.

The explanation made by the Trust actuary is simply that hypothetically the current assets could be converted into cash and immediately invested to insure the payments of benefits in the future.

As should be pointed out, the investments on hand at the PBGC rates would not be sufficient to cover the liability for vested benefits and

as a result thereof, the Trust actuary was required to make his "best estimate" based upon a long-range investment return. The Trust actuary made it clear that while PBGC rates could be applied to "money on hand," those rates could not be applied where funds are not available since there is no way to "lock in" a rate to funds which may be available in the future.

The Trust actuary in making his best estimate as to the future investment return based his estimate taking into account (a) historical long-term investment rates, and (b) the Trust's own personal investment history. In doing so, the Trust actuary took into account the ten (10) year period from 1971-1980 and determined the *average* return for the period to be 6.85%. With that history in mind, the Trust actuary determined the 6.0% rate, which is the funding rate, to be reasonable taking into account further the melding of the PBGC rates of 9.25% and 8.5%. As can be seen, the melded rate is very close to the historical performance of the Trust.

Concrete Pipe in asserting the "two-tiered" rate was unreasonable called as its expert actuary witness Mr. Jon L. King. Mr. King is an enrolled actuary (Co. Exh. 13), and is presently employed as manager of Buck Consultants' Los Angeles office. He has been employed as a consulting actuary by Buck since 1986. King testified that his experience in pension plans has been limited to single-employer pension plans. Also, that Buck Consultants has no clients in California among the multi-employer pension funds.

King stated that he had reviewed the data upon which the actuary assumptions were made in the instant case and determined that there were three assumptions that concerned him: (1) the net income assumptions, (2) unrecorded past credit assumption, and (3) lastly, the interest rate assumption. King allowed that the first two assumptions had minimal impact, so he focused on the interest rate assumption in coming to the conclusion that it was "unreasonable in the aggregate."

King further testified that he looked at "economic realities" in his analysis, "rather than looking at what assumptions are being used for this and that purpose by other actuaries." King pointed out that he doesn't believe in following the "herd" (of actuaries).

In support of King's contention of the interest rate assumption being too low, King used his firm's published interest rates, entitled "Buck Forward Rates," which are a set of interest rates derived from the

actual marketplace for risk-free United States securities, i.e., treasury bills and U. S. Government bonds and notes.

King expressed the opinion that he did not believe the assumptions used for funding were applicable to withdrawal liability cases and that not only was the interest rate assumption too low, but that the PBGC interest for single employer terminations was too low as well.

The standard that Mr. King would apply in consideration of whether the interest rate assumption was unreasonable or not would be that if it met the interest rate of the "Buck Forward Rates," it would be reasonable; otherwise, not.

It is interesting to note that King was unable to state any multi-employer pension fund which has used the "Buck Forward Rates" method.

It is noteworthy to point out the lack of expertise King has in respect to multi-Employer Pension Funds. There is a real difference between a multi-Employer Pension Fund and a single Employer Fund. In multi-Employer Funds, in a withdrawal situation, there is an ongoing continuation of the Plan. The employees of the withdrawing Employer are not dropped as participants of the Plan, but will continue to remain participants until such time as they are eligible for retirement benefits. Further, notwithstanding the withdrawal of the Employer, the continuing Employers must continue their contributions to the Plan and the withdrawing Employer's obligation to the Plan must be balanced against the obligation of the Employers continuing to make contributions. In the termination of a single Employer plan, obligations to all plan participants are fixed and paid as of a certain date.

During his testimony in respect to reasonableness, King refers to the realities of the marketplace and competitive rates.

Actuaries, for the most part, agree that a funding valuation is not an exact science and, accordingly, there does not appear to be any one answer in defining "reasonableness." That being the case, the standards in the statutes, the court cases, as well as the arbitrators' decisions, must be looked to in determining whether the facts in each case come with the parameters of the term "reasonable." In the *Eberhard* case, *supra*, the court upheld the Arbitrator's decision that the interest rate (6%) was *not* unreasonable.

While the actuary witness testifying for Concrete Pipe concludes that the Segal method in the determination of interest rate assumptions

are unreasonable, he ignores 29 U.S.C. 1393(a)(1) of ERISA which mandates that the actuary take into account the experience of the plan and reasonable expectations. This the Segal Company has done in coming up with its best estimate.

Concrete Pipe's actuary concludes that the "two-tiered" method used in the computation of the withdrawal liability and the interest rate assumption used for funding, as well as the PBGC rate, are "unreasonable in the aggregate."

The specific Segal method of using the interest rate assumption and the PBGC rates of interest comprising a blended rate have been the subject of numerous Arbitrator decisions.

Arbitrator William Hannan, in *Joy Mfg. Co.*, 5 EBC at 1135 (Feb. 1984), stated, "When we take into consideration that the 'blended rate' is a combination of the funding rate and the higher PBGC rate, we have an applicable rate which produces a withdrawal liability lower than the not unreasonable rate which most actuaries would have calculated . . . "

In *Ellis and Construction Laborers Pension Trust*, 5 EBC at 1175-76 (Feb. 1984), Arbitrator Martin Zimring upheld the use of the Segal formula as to the blending of rates.

Walter Slater, the Arbitrator in *J. L. Denio, Inc. and Operating Engineers Pension Trust*, 8 EBC at 1990 (June 1987), states, "The boundaries of reasonableness appear to be PBGC rates on the high side and funding valuation rates on the low side. Somewhere in between we find such as the Segal Company's blend."

Concrete Pipe has the burden of rebutting the presumption of Section 1401 of ERISA and establishing by a preponderance of the evidence that the determination of the Plan sponsor was unreasonable. This they did not do.

IV

Conclusion

It is concluded, therefore, that Concrete Pipe has failed to carry the burden of overcoming the statutory presumption by a preponderance of the evidence.

V

Attorneys' Fees and Costs

Each party in this proceeding has requested that the legal expense,

in the event of a successful result, be assessed against the other party. The Arbitrator does not feel justified in allocating either party's legal expense to the other. Both parties have acted in good faith and have diligently and professionally urged their respective positions; hence, each party will bear its own legal expenses and costs.

AWARD

At the outset of this phase of the arbitration proceedings, the parties agreed that the Arbitrator, after having taken evidence, hearing arguments as well as studying the briefs filed, would determine the money amount of the withdrawal liability due the Trust from Concrete Pipe and Products Company of California and render an appropriate award. Based upon the reasons aforesaid stated, the award is as follows:

1. Concrete Pipe and Products Company of California has failed to show by a preponderance of the evidence that, in the aggregate, the actuarial assumptions and methods used by the Trust in the determination of Concrete Pipe and Products Company of California were unreasonable.

2. Concrete Pipe and Products Company of California is not liable for the one-year contribution history of Cen-Vi-Ro which was included in the Trust's original calculation.

3. Concrete Pipe and Products Company of California is liable for withdrawal liability of $190,465.57, plus accrued interest, to the Trust which the Trust acknowledges is the calculation of the liability using the same actuarial assumptions and methods as were applicable in the original calculation, except that the one-year contribution history of Cen-Vi-Ro is eliminated.

4. The Arbitrator's fees and expenses together with the administrative fees of the American Arbitration Association shall be shared equally by the parties. Each party shall bear its own costs and legal expenses.

KENNETH M. SCHWARTZ, Arbitrator

Dated: August 16, 1988

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MALCOLM M. LUCAS, JUDGE PRESIDING

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Plaintiff, vs. CEN-VI-RO CONCRETE PIPE & PRODUCTS, INC., Defendant.	)	No. CV 82-5184-MML
CONCRETE PIPE & PRODUCTS COMPANY OF CALIFORNIA, Plaintiff, vs. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant.	)	No. CV 83-132-MML

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, March 19, 1984

DON MEHLER, CSR
Official Reporter
442 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

APPEARANCES:

For Construction Laborers Pension Trust for Southern California:

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For Concrete Pipe & Products Company, Inc.:

DIEPENBROCK, WULFF, PLANT & HANNEGAN
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LOS ANGELES, CALIFORNIA, MONDAY, MARCH 19, 1984; 10:00 A.M.

(Other court matters.)

THE CLERK: Item No. 15, CV 82-5184, Construction Laborers Pension Trust for Southern California v. Cen-Vi-Ro Concrete Pipe & Products, for cross-motions for summary judgment.

Counsel, state your appearances, please.

MR. BEERS: Everitt Beers, Cox, Castle & Nicholson, for the Construction Laborers Pension Trust.

THE COURT: Good morning.

MR. MURPHY: Dennis Murphy appearing on behalf of Concrete Pipe & Products Company.

THE COURT: Good morning, gentlemen.

I have read and considered what has been filed in this matter. Does either side wish to be heard further?

MR. MURPHY: Your Honor, Concrete Pipe & Products would just like to address a few issues. In our briefs we addressed very technical legal points, and I would just like to point out a few pragmatics of the situation. I think it's necessary to understand, in discussing the constitutional arguments, the retroactive effect of the particular actions. As you know, the unions on behalf of their clients, the employees, demand that employers enter into these multi-employer plans. Employers agree for a certain sum of money and then set their prices for their goods and services based on the contractual rate of pay. And in this case, our client stopped producing the widgets — in this case, concrete pipe — two years before or a year and a half before the act was passed. All their financial transactions are closed. There is no way to recover the money. And now we are being assessed almost two times what we paid as unfunded liability upon withdrawal from the trust fund. And while the act is not retroactive in that it is applying —all the arguments don't go to that — it is retroactive in its effect in its total application to this particular person or this particular business and should be viewed as such, your Honor, because there is absolutely no way for Concrete Pipe & Products Company to recover one dime of the money by way of increasing its costs of its product. I think that's a very important issue.

I think that also, the act is passed, and the financial impact upon

somebody going out of business is disastrous and has to be considered a taking of money from one to another, as the Alton case, which was cited by the Ninth Circuit as good authority, properly points out. To me, that is the practical effect of what is going on. They're going into closed transactions. They're taking money from one and potentially bankrupting one to give money to another, despite contract provisions that specifically prohibit this.

With respect to another area, I would like to point out the pragmatic effect. In this particular case, the trust funds come in with a presumption that their decisions are correct. They are entitled to determine the amount of liability under four formulas. They don't have to state any method which they choose the formula. It can be relevant or not relevant. They can go from 5 percent on actuarial rates to 9, 10, 12, and based on whatever they do, you can go from zero liability to hundreds of thousands of dollars, and their judgment is presumed correct in litigation, and there is no rational basis for this. In fact, the statute on that point not only presumes them to be correct, but is extremely vague in saying what basis they use in making their determination. They don't have to use data. They can use their best estimates of what is correct. And if they don't have sufficient base data they can use a sampling of data. And all that is required is that in the aggregate, it be reasonable or their best estimate.

And I feel that all these things have got to be considered in determining whether my clients have been given any real due process in this issue.

THE COURT: All right. Let me ask, Mr. Murphy, do you agree that the threshhold question may well be, the factual question, that is, when Concrete Pipe withdrew? If Concrete Pipe did, from a factual standpoint, cease operations in 1979, in essence, withdrawing from the pension trust plan, then we would never reach the constitutional issues in this —

MR. MURPHY: Well, that's our first point, your Honor. We think that we've briefed that capably. I think it comes down to a definition, does permanently cease to cover operations, does the term "permanently" mean lasting forever or does it mean lasting indefinitely, like the opposing side has defined in their brief? We think that this is clearly one that is a permanent cessation of operations under the term "lasting indefinitely."

THE COURT: Well, before we go further into the merits of that question, it is a factual question and will have to be resolved further in processing this case. But in terms of the resolution of that factual dispute, who is to resolve it, the court or an arbitrator?

MR. MURPHY: I think, your Honor, the court is to resolve it, because our position on that is simple. If we did in fact withdraw in 1979, we never came under this act. We were out from under it. We have no obligations under it. It doesn't involve us. The act was passed in September 26, 1980, and we ceased doing business at this plant on August 17, 1979. And we say that that act involves others, but not us. And its retroactive application only goes back to May of 1980. And clearly, we had stopped producing concrete pipe, we had shipped our equipment to our main plants in Sacramento, we had laid off our employees, we were searcing for a new plant in San Bernardino or Riverside. We had done everything possible to terminate our business at that particular plant. And we believe that all the facts are basically undisputed. Both counsel try and draw different inferences from the undisputed facts, but I think the facts are undisputed.

THE COURT: All right. Thank you, Mr. Murphy.

MR. MURPHY: Thank you, your Honor.

MR. BEERS: Your Honor, turning first to the issue of withdrawal, we do think that is an issue that's appropriate for the Court to decide here. All the facts are necessary to decide it. It's just a question of interpreting Section 1383, as to what "permanent" means. We don't think any additional —

THE COURT: So I'm clear as to your position, you do not feel that that factual dispute, the issue and question of the date of withdrawal, is a matter that should be heard by an arbitrator?

MR. BEERS: No, your Honor. We feel that further factual development before an arbitrator would not add to the Court's ability to decide that issue now. But if the Court feels that arbitration is appropriate on the withdrawal issue prior to the Court interpreting the withdrawal provisions, we point out that it would then be necessary to determine the other provisions of the act, which are facial constitutional challenges, and decide the constitutionality of those other provisions as discussed in the papers. Therefore, even if —

THE COURT: Well, I think Shelter Framing said that the constitutional issues, as opposed to factual, do not have to be submitted

to the arbitration process.

MR. BEERS: Correct, your Honor; along with Peick, Textile Workers, and Republic.

THE COURT: All right. Go ahead, Mr. Beers.

MR. BEERS: Okay. Responding to what I think are three points made by Mr. Murphy on his presentation, first of all, he talks about the need to recoup costs in the future for the liabilities incurred by Concrete Pipe at its plant in the past. I point out that withdrawal liability is based upon the employer's proportionate share at the time it withdrew of the employee benefits vested at that time, based upon that particular employer's proportionate share of past contributions, as opposed to total contributions, to the trust. There is no future recouping of costs in the future. This is simply Concrete Pipe paying its fair share of benefits promised to employees at the time it withdrew.

Referring to the takings discussion made by Mr. Murphy, he mentions the case of Alton Railroad. Of course, Alton Railroad is one of the United States Supreme Court cases, along with the cases striking down state child-labor laws and the NRA legislation during the early part of the depression, which the Supreme Court has since, of course, eschewed. The modern rule is in areas of economic regulation, the court hunts through the legislation based upon a not arbitrary or unreasonable standard, and does not address the underlying wisdom of the legislation.

In this case, the three cases that have addressed this issue, the Second, Fourth, and Seventh Circuits in Textile Workers, Republic, and the Peick decisions, have all upheld the MPPAA unanimously.

Particularly turning to the takings issue, there is no takings involved here. All three of those cases have held that for the takings laws to apply, there has to be a physical taking of property by governmental action, such as garnishment or claim of delivery or similar procedures where the government goes out and seizes property. That is not the case here.

The last argument made by Mr. Murphy was regarding the presumption attached to the initial decision of the trustees regarding the amount of withdrawal liability. There' s no constitutional question here. Congress every day and state courts every day set the burden of proof on one side or the other for any matter to be decided by a court. This is simply setting of a burden of proof.

Also, the reasonable actuarial standards test used in the MPPAA for judging and controlling the trustees' setting of withdrawal liability is standard economic legislation. This is economic legislation. It's not legislation in an area involving protective constitutional conduct, such as freedom of speech. The United States Supreme Court has again and again upheld economic regulations requiring various organizations to set reasonable prices or reasonable routes.

In closing, your Honor, I just want to point out that, as carefully discussed in our papers, three circuit-court opinions have addressed every single issue in this case and have unanimously upheld the MPPAA on every single aspect challenged by Concrete Pipe. The case of Shelter Framing, which is discussed at length in Mr. Murphy's papers, addressed the sole issue of the constitutionality of the retroactive date of the MPPAA. That case expressly limits its decision to that small part of the MPPAA. While the Construction Laborers Pension Trust urges your Honor to follow the three decisions that have addressed every issue of the case, if your Honor for some reason finds part of Shelter Framing to be applicable to the facts of this case, we request that your Honor stay this action until the Supreme Court decides Shelter Framing. It is —

THE COURT: The petition for certiorari is still pending before the Supreme Court, is it not?

MR. BEERS: Correct, your Honor. The petition for cert is pending, but the joint appeal, which is part of the same decision of Gray, has had probable jurisdiction noted. That's a federal appeal. The Supreme Court has noted jurisdiction in Gray, scheduled oral argument for April, and the petition for cert has been at each session of the court left pending, which I understand is the normal procedure for the United States Supreme Court when it has two cases that involve the same factual issue, to either grant cert or note probable jurisdiction on one and just keep the other pending. Since the Supreme Court next to never, except for maybe the Sony case and a couple others, carries decisions over from term to term, I would expect a decision to be written by the United States Supreme Court by the end of this term in July. So if the Court finds Shelter Framing to be at all controlling, I simply request the Court stay further decision in this case until that decision comes out by the end of the term in July.

The last comment I have, you Honor, is regarding a case that was

cited in the last set of papers exchanged by the parties, and that is an NLRB decision called Illinois Coil Spring Company. First of all, your Honor, the context in which that case was cited is to support Concrete Pipe's contention that it would have not had to bargain with the unions involved if the plant at Shafter had been moved to another location. Illinois Coil Spring Company is a National Labor Relations Board Decision, not a court decision. However, the dissent in there very ably points out how the Board's decision is inconsistent with the United States Supreme Court case of Fiber Products, which held in an analogous situation that there is a duty for mandatory collective bargaining in such a situation. And also, the dissent in that case cites numerous previous NLRB decisions with which the Illinois Coil Spring Company case is inconsistent.

No further comments, you Honor, unless you have questions.

THE COURT: All right. Thank you, Mr. Beers.

Anything further, Mr. Murphy?

MR. MURPHY: One or two, your Honor.

I think your concern, as I sense it here, is: Do you have the right to determine the factual issues in this case? I figure that this is analogous to decisions that come before you all the time. I'm sure there are many people, parties come before you to determine whether they are bound to arbitrate under a contract, and you're quite familiar with the fact that you have to determine the threshold issue as to whether they have contractually obligated themselves to arbitrate, and, if they have, then you go arbitrate all the facts.

Basically, we are saying there is no contract here requiring us to arbitrate. This statute doesn't require us to arbitrate, because this statute doesn't apply to withdrawals that occurred before 1980; May of 1980, to be precise. And I think that that is a clear analogy to the normal cases to compel arbitration that come before this court. It's a determination whether there's a threshold requirement that you go to arbitration. And I don't think the Congress said that people who withdrew before 1980 have to go to arbitration. I think they said that people who withdrew after April 29, 1980, do, but those who did before that point do not have to. And that's why we think that this factual dispute is properly before you.

And then, of course, our position is that the Ninth Circuit Court of Appeals' Shelter Framing decision is in fact controlling, because it did

in fact determine most of the elements of these substantive due-process claims, and the Ninth Circuit determined those adversely to the pension trust, and the Ninth Circuit is, of course, controlling in this district.

Thank you, your Honor.

THE COURT: All right. Thank you, Mr. Murphy and Mr. Beers. The matter —

MR. BEERS: Your Honor, just one sentence of clarification?

THE COURT: I think we must stop the ceaseless oscillation of argument, gentlemen. The matter will stand submitted.

MR. BEERS: Thank you, your Honor.

CERTIFICATE

I certify that the forgoing is a true and correct transcript from the stenographic record of proceedings in the foregoing matter.

Don Mehler, Official Reporter — June 26, 1984

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Plaintiff-Appellee, v. CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC., Defendant-Appellant.	No. CV 89-55854 D.C. No. CV-82-5184-HLH **O R D E R**

Before: HUG, NORRIS, and LEAVY, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. p. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en bac is **REJECTED**.

Sept. 24, 1991

29 U.S.C. § 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section —

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted —

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

(Pub. L. 93-406, Title IV, § 4201, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1217.)

29 U.S.C. § 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall —

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

(Pub. L. 93-406, Title IV, § 4202, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1218.)

29 U.S.C. § 1383. Complete Withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if —

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan —

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if —

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer —

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

(c) Entertainment industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B)(i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means—

(A) theater, motion picture (except to the extent provided in

regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary —

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

(d) Other determinative factors

(1) Notwithstanding subsection (a) of this section, in the case of an employer who —

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

(3) A withdrawal occurs under this paragraph if —

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either —

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount

equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operation ceased.

(5) If the corporation determines that the employer has no further liability under the plan either —

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules —

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

(Pub. L. 93-406, Title IV, § 4203, as added Pub. L. 96-364, Title I, §104(2), Sept. 26, 1980, 94 Stat. 1218.)

29 U.S.C. § 1387. Reduction or waiver of complete withdrawal liability; procedures and standards applicable

(a) The corporation shall provide by regulation for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from a plan subsequently resumes covered operations under the plan or renews an obligation to contribute under the plan, to the extent that the corporation determines that reduction or waiver of withdrawal liability is consistent with the purposes of this chapter.

(b) The corporation shall prescribe by regulation a procedure and standards for the amendment of plans to provide alternative rules for the reduction or wiaver of liability for a complete withdrawal in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan. The rules may apply only to the extent that the rules are consistent with the purposes of this chapter.

(Pub. L. 93-406, Title IV, § 4207, as added Pub. L. 96-364, Title I, §104(2), Sept. 26, 1980, 94 Stat. 1223.)

29 U.S.C. § 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan.

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of —

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2) (A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for the plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending —

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which —

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of —

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the

last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of —

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction —

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of —

(A) such unamortized amount; multiplied by —

(B) a fraction —

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers —

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4) (A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of —

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corportion.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of —

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the

unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be determined in a manner different from that provided in subsection (b) of this section.

(2) (A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of —

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction —

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of —

(i) an amount equal to —

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction —

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The corporation may by regulation permit adjustment in any denominator under this section consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of —

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction —

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4) (A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of —

(i) the plan's unfunded vested benefits which are attributable to

participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying —

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction —

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction —

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets under subparagraph (C) by a fraction —

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all the preceding plan years; and

(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction —

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws is equal to —

(i) an amount equal to —

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the

end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to —

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5) (A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method

shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) of this section shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of Title 26, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c) of this section.

(2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following merger of multiemployer plans

In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) of this section shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

(Pub. L. 93-406, Title IV, § 4211, as added Pub. L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1226, and amended Pub. L. 98-369, Title V, § 558(b)(1)(A), (B), July 18, 1984, 98 Stat. 899; Pub. L. 101-239, Title VII, § 7891(a)(1), Dec. 19, 1989, 103 Stat. 2445.)

29 U.S.C. § 1392. Obligation to contribute

(a) Definition

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising —

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

(Pub. L. 93-406, Title IV, § 4212, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1233.)

29 U.S.C. § 1393. Actuarial assumptions

(a) Use by plan actuary in determining unfunded vested benefits of a plan for computing withdrawal liability of employer

The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of —

(1) actuarial assumptions and methods which, in the aggregate, are

reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or

(2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

(b) Factors determinative of unfunded vested benefits of plan for computing withdrawal liability of employer

In determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part, the plan actuary may —

(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of Title 26 and reasonable estimates for the interim years of the unfunded vested benefits, and

(2) in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

(c) Determination of amount of unfunded vested benefits

For purposes of this part, the term "unfunded vested benefits" means with respect to a plan, an amount equal to —

(A) the value of nonforfeitable benefits under the plan, less

(B) the value of the assets of the plan.

(Pub. L. 93-406, Title IV, § 4213, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1233, and amended Pub. L. 101-239, Title VII, § 7891(a)(1), Dec. 19, 1989, 103 Stat. 2445.)

29 U.S.C. § 1397. Application of part in case of certain pre-1980 withdrawals; adjustment of covered plan

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable —

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there

was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a) of this section.

(Pub. L. 93-406, Title IV, § 4217, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1235, and amended Pub. L. 92-369, Title V, § 558(b)(1)(A), (B), July 18, 1984, 98 Stat. 899.)

29 U.S.C. § 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall —

(A) notify the employer of —

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2) (A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer —

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of —

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's

liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1) (A) (i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made of the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C) (i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of —

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 1385(a)(1) of this title shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 1385(b)(1)(B)(i) of this title.

(ii) (I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under the clause (i)) the average of the required employer contributions under the plan for the period of 3 consecutive

plan years (during the period of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies

(III) This clause shall not apply in the case of any withdrawal described in subparagraph (D).

(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after September 26, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdraw from the plan —

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 1385(a) of this title, the amount of each annual payment shall be the product of —

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 1386(a)(2) of this title.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means —

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such

rules —

(A) are consistent with this chapter, and

(B) are not inconsistent with regulations of the corporation.

(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

(d) Applicability of statutory prohibitions

The prohibitions provided in section 1106(a) of this title do not apply to any action required or permitted under this part.

(Pub. L. 93-406, Title IV, § 4219, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1236, and amended Pub. L. 98-369, Title V, § 558(b)(1)(B), July 18, 1984, 98 Stat. 899.)

29 U.S.C. § 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of —

(A) the date of notification to the employer under section 1399(b)(2)(B) or this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3) (A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399

of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that —

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final

decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

(Pub. L. 93-406, Title IV, § 4221, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1239.)

29 U.S.C. § 1451. Civil Actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of

section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action including, reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of —

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

(Pub. L. 93-406, Title IV, § 4301, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1263.)

AMENDMENT V

GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

29 C.F.R. § 2647.8 Special rules.

(a) *Employer that has withdrawn and reentered the plan before the effective date of this part.* This part shall apply in accordance with the rules in this paragraph, with respect to an eligible employer that completely withdraws from a multiemployer plan after September 25, 1980, and is performing covered work under the plan on the effective date of this part. Upon the application of an employer described in the previous sentence, the plan sponsor of a multiemployer plan shall determine whether the employer satisfies the requirements for abatement of its complete withdrawal liability under this part. Pending the plan sponsor's determination, the employer may provide the plan with a bond or escrow that satisfies the requirements of § 2647.3, in lieu of making its withdrawal liability payments due after its application for an abatement determination. The plan sponsor shall notify the employer in writing of its determination and the consequences of its determination as described in § 2647.2(c) or (d) and (e), as applicable. If the plan sponsor determines that the employer qualifies for abatement, only withdrawal liability payments made prior to the employer's reentry shall be retained by the plan; payments made by the employer after its reentry shall be refunded to the employer, with interest on those made prior to the application for abatement, in accordance with § 2647.2(e)(2). If a bond or escrow has been provided to the plan in accordance with § 2647.3, the plan sponsor shall send a copy of the notice to the bonding or escrow agent. Sections 2647.5-2647.7 shall apply with respect to the employer's subsequent complete withdrawal occurring on or after the effective date of this part, or partial withdrawal occurring either before or after that date. This paragraph shall not negate reasonable actions taken by plans prior to the effective date of this part under plan rules implementing section 4207(a) that were validly adopted pursuant to section 405 of the Multiemployer Act.

(b) *Employer with multiple complete withdrawals that has reentered the plan before effective date of this part.* If an employer described in paragraph (a) of this section has completely withdrawn from a multiemployer plan on two or more occasions before the effective date of this part, the rules in paragraph (a) of this section shall be applied as modified by this paragraph.

(1) The plan sponsor shall determine whether the employer satisfies the requirements for abatement under § 2647.4 based on the most

recent complete withdrawal

(2) If the employer satisfies the requirements for abatement, the employer's liability with respect to all previous complete withdrawals shall be abated.

(3) If the liability is abated, §§ 2647.5 and 2647.6 shall be applied as if the employer's earliest complete withdrawal were its initial complete withdrawal.

(c) *Employers with multiple complete withdrawals that has not reentered the plan as of the effective date of this part.* If an eligible employer has completely withdrawn from a multiemployer plan on two or more occasions between September 26, 1980 and the effective date of this part and is not performing covered work under the plan on the effective date of this regulation, the rules in this part shall apply, subject to the modifications specified in paragraphs (b)(1)-(b)(3) of this section, upon the employers reentry into the plan.

(d) *Combination of withdrawn employer with contributing employer.* If a withdrawn employer merges or otherwise combines with an employer that has an obligation to contribute to the plan from which the first employer withdrew, the combined entity is the eligible employer, and the rules of § 2647.4 shall be applied —

(1) By subtracting from the measurement period contribution base units the contribution base units for which the non-withdrawn portion of the employer was obligated to contribute in the last plan year ending prior to the combination;

(2) By determining the base year contribution base units solely by reference to the contribution base units of the withdrawn portion of the employer; and

(3) By using the date of the combination, rather than the date of resumption of covered operations, to begin the measurement period.

(e) *Combination of two or more withdrawn employers.* If two or more withdrawn employers merge or otherwise combine, the combined entity is the eligible employer, and the rules of § 2647.4 shall be applied by combining the number of contribution base units with respect to which each portion of the employer had an obligation to contribute under the plan for its base year. However, the combined number of contribution base units shall not include contribution base units of a withdrawn portion of the employer that had fully paid its withdrawal liability as of the date of the resumption of covered operations.

Supreme Court, U.S.
FILED
MAY 8 1992
OFFICE OF THE CLERK

(2)

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1991
No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW AND SUMMARY OF ARGUMENT

1. Since MEPPAA expressly provides that "Any dispute between an employer and the plan sponsor concerning a determination [of withdrawal liability] shall be resolved through arbitration," the District Court was correct in requiring the parties to submit the issue of the date of complete withdrawal to arbitration because of the need to resolve conflicting factual inferences, regardless of whether that date was determined to be before or after the effective date of MEPPAA.

2. Since the section 1401 presumptions in favor of the Trust only allocate the burden of proof on the employer to show that the Trust's determinations are unreasonable, and do not deprive the employer of its right to fully challenge those determinations both before an impartial arbitrator and the Court, the presumptions comply fully with procedural due process requirements, including the providing of an impartial decision-maker.

3. Since there is substantial evidence to support the arbitrator's conclusion that Concrete Pipe permanently withdrew from the Trust in December 1981 when it terminated its collective bargaining agreement, and not when it temporarily idled its plant in August 1979, the District Court correctly confirmed the arbitrator's finding under §1383 that Concrete Pipe withdrew *after* the September 1980 effective date of MEPPAA, and that Concrete Pipe is therefore liable for withdrawal liability.

   a. By Terminating Its Collective Bargaining Agreement In 1981, Concrete Pipe Effected A Complete Withdrawal Pursuant To §1383(a)(1) Because It Then Permanently Ceased To Have An Obligation To Contribute To The Plan.

   b. Any Subjective "Intent" Of Concrete Pipe To Make Its Temporary Idling Of The Plant In August Of 1979 "Permanent" Is Irrelevant. Permanence Is Determined By The Objective Facts, And Concrete Pipe's Going Back Into Full Production In November And December Of 1981 Made The Idling Of The Plant In August

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c. Even If Concrete Pipe's Intent Was Relevant In Determining Whether There Was A Permanent Cessation Of Covered Operations, The Evidence Showed That Concrete Pipe Intended That The 1979 Idling Of The Shafter Plant Be Temporary.

4. MEPPAA constitutionally modified contract rights in an area already subject to extensive prior economic regulation, and therefore, there was no violation of substantive due process or of the taking clause.

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1. By Terminating Its Collective Bargaining Agreement In 1981, Concrete Pipe Effected A Complete Withdrawal Pursuant To §1383(a)(1) Because It Then Permanently Ceased To Have An Obligation To Contribute To The Plan. 17

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I. INTRODUCTION

By the present Petition for Writ of Certiorari, Petitioner Concrete Pipe and Products of California, Inc., ("Concrete Pipe") seeks to reverse the Ninth Circuit's affirmance of the District Court's confirmation of an American Arbitration Association award issued in favor of Respondent The Construction Laborers Pension Trust for Southern California ("Trust") against Concrete Pipe in the amount of $190,465.57 plus interest. In addition, the District Court awarded attorneys' fees in favor of the Trust.

The proceedings below arose out of attempts by the Trust to collect "withdrawal liability" from Concrete Pipe. Withdrawal liability arises under the Multi-Employer Pension Plan Amendments Act of 1980 ("MEPPAA"), 29 U.S.C. §§1381-1405, which provides that an employer withdrawing from a multi-employer pension plan after September 26, 1980, must pay to the plan the employer's its proportionate share of the pension plan's unfunded vested liability to the plan's beneficiaries.

II. STATEMENT OF THE CASE

A. Summary Of Procedural History

On October 5, 1982, the Trust filed an action against Concrete Pipe in the United States District Court for the Central District of California, case 82-5184-MML, seeking collection of withdrawal liability due under MEPPAA. (White CR-1. The preceding reference to the record and those that follow are to the Appendix filed before the Ninth Circuit.)

On October 6, 1982, Concrete Pipe filed its own action against the Trust in the United States District Court for the Eastern District of California, case 82-389-EDP. In its complaint, Concrete Pipe sought declaratory and injunctive relief against the collection of withdrawal liability by the Trust, asserting that Concrete Pipe had withdrawn from the Trust prior to the effective date of MEPPAA and also that MEPPAA was unconstitutional on numerous grounds.

Pursuant to stipulation, the Eastern District action was transferred to the Central District and assigned case 83-132-WMB. The actions were then consolidated.

After conducting discovery, the parties filed extensive stipula-

tions of fact and simultaneously filed cross-motions for summary judgment on the issues of (1) the date of Concrete Pipe's withdrawal and (2) the constitutionality of MEPPAA. The cross-motions for summary judgment were heard before Judge Malcolm M. Lucas on March 19, 1984.

On April 4, 1984, Judge Lucas rendered his opinion and order upholding the constitutionality of the mandatory arbitration provisions of MEPPAA and ordering that the parties submit their dispute to arbitration to resolve all remaining issues of fact, including specifically the date that Concrete Pipe withdrew from the pension plan. As stated by Judge Lucas, the factual question for resolution by the arbitrator was:

> "Did Concrete Pipe permanently close its Shafter plant in 1979, as Concrete Pipe maintains, or did it, as the Pension Trust argues, simply 'mothball' the facility pending its relocation elsewhere in the Union's jurisdiction or pending an increase in business such as apparently occurred in 1981?"

(Order Compelling Parties to Submit to Arbitration, White CR-68, p. 5.)

The Court then went on to reserve judgment on the remaining constitutional issues briefed in the summary judgment motions, pending their possible renewal after arbitration. Finally, the Court expressly retained jurisdiction to enforce its order to arbitrate. (*Id.* at 9.)

Concrete Pipe then appealed the District Court's arbitration order to the Ninth Circuit. The appeal was dismissed by the Ninth Circuit in November of 1985 with the Court holding that it did not have jurisdiction over Concrete Pipe's interlocutory appeal. The Ninth Circuit then remanded the case to the District Court. *Construction Laborers Pension Trust v. Cen-Vi-Ro*, 776 F.2d 1416 (9th Cir. 1985).

Pursuant to the District Court's order, the arbitration then commenced before the American Arbitration Association. At the request of Concrete Pipe, the arbitrator bifurcated the arbitration, with the first session to determine liability and the second session to determine the amount of withdrawal liability.

During the first arbitration session on liability, Concrete Pipe contended that it withdrew from the Trust prior to the effective date of MEPPAA by temporarily idling its plant, thereby avoiding

the imposition of "withdrawal liability.' At the first hearing, the arbitrator decided against Concrete Pipe, finding that its pre-enactment idling of the plant was not a "permanent cessation of covered operations" sufficient to constitute a "complete withdrawal." Instead, the arbitrator held that Concrete Pipe's termination of its collective bargaining agreement after the effective date of MEPPAA was the 'complete withdrawal' from the Trust, thereby triggering "withdrawal liability.' More specifically, the arbitrator held as follows:

> "Concrete Pipe and Products Company of California did not permanently close its Shafter, California plant in August 1979, but simply 'mothballed' the facility pending an increase in business, which increase in business resulted in the reopening of the plant for production on November 1, 1981."
>
> "Accordingly, the Concrete Pipe and Products Company of California is liable under MEPPAA for withdrawal liability."

(Decision of Arbitrator, August 26, 1987, Blue CR-1, Ex. A, pp. 13-14.)

During the second arbitration session on the amount of withdrawal liability, Concrete Pipe contended that the actuarial assumptions and methods used by the Trust in calculating the amount of withdrawal liability were unreasonable. At the second hearing, the arbitrator found that Concrete Pipe "failed to show by a preponderance of the evidence that, in the aggregate, the actuarial assumptions and methods used by the Trust in the determination of Concrete Pipe and Products Company of California['s liability] were unreasonable." The arbitrator then held Concrete Pipe liable for $190,465.57 in withdrawal liability, plus accrued interest. (Decision and Award of Arbitrator, August 16, 1988, Blue CR-1, Ex. B, p. 27.)

On September 26, 1988, Concrete Pipe filed a complaint with the District Court seeking to vacate or modify the arbitrator's award. (Blue CR-1.) The Trust then filed an answer and counterclaim seeking to confirm the arbitrator's award. (Blue CR-7.)

The Trust and Concrete Pipe then filed cross-motions, the Trust's to confirm the award and Concrete Pipe's to vacate the award.

On July 6, 1989, Judge Hupp entered his "Order re Cross Motions to Vacate/Modify/Confirm Arbitration Award." (White

CR- 127.) In his thorough and carefully reasoned decision, Judge Hupp upheld (1) the constitutionality of MEPPAA (*Id.* at 2-3.), (2) the arbitrator's decision on liability based on "complete withdrawal" after the effective date of MEPPAA (*Id.* at 3-7.), and (3) the arbitrator's decision on the amount of withdrawal liability (*Id.* at 7-10). Additionally, Judge Hupp awarded the Trust its costs of suit and attorneys' fees for all court work. (*Id.* at 10.)

First, in upholding the constitutionality of MEPPAA, Judge Hupp found that the Ninth Circuit's case of *Board of Trustees v. Thompson Building Materials*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985), was controlling. In *Thompson*, the Ninth Circuit upheld the constitutionality of many of the provisions of MEPPAA attacked by Concrete Pipe, and the District Court expressly found that the facts of *Thompson* were not distinguishable from the present case.

Second, in upholding the arbitrator's decision on liability, Judge Hupp found substantial evidence to support the arbitrator's conclusion that the temporary idling of the plant before the enactment of MEPPAA was not a "permanent cessation of covered operations" such as would have triggered a "complete withdrawal" that would have avoided liability for withdrawal:

> "Here the evidence is consistent with the conclusion drawn by the arbitrator that CPP did not intend to permanently cease operations at the Shafter plant, but that CPP merely closed what was apparently at the time an uneconomical operation. When the plant again became economical, it was reopened for a period, thus demonstrating that the closing was conditional. As powerfully set out by the arbitrator, CPP's retention of the site, the sending of salesmen into the area, and the negotiation and conclusion of a contract for which the plant was later reopened, all negate an intent to abandon permanently the covered operations at the Shafter plant. Thus, the arbitrator had sufficient basis to conclude that the date of cessation of the obligation to pay benefits (which was after the effective date of MPPAA) was the date of complete withdrawal."

(*Id.* at 5-6.)

Third, and finally, Judge Hupp found substantial evidence to

support the arbitrator's conclusion that the actuarial assumptions and methods used by the Trust were reasonable:

> "The plan's actuary had the significant fortifying feature of being the most widely recognized in the field, with massive experience nationwide in advising pension trustees. CPP attacked the assumptions with an actuary of vastly less experience (in fact no experience with multi-employer trusts). While the use of any economic prediction factor can be debatable, the Court cannot say, or come close to saying, that the conclusions of the arbitrator are against the clear preponderance of evidence. The Court accepts the reasoning of the arbitrator in this respect and adopts his findings."

(*Id.* at 9.)

On August 4, 1989, Concrete Pipe filed its notice of appeal of the rulings of Judges Lucas and Hupp thereby commencing the appeal before the Ninth Circuit. (White CR-128.)

The Ninth Circuit subsequently affirmed the District Court's decision and denied Concrete Pipe's request for a rehearing *en banc*.

Concrete Pipe then filed the present Petition for Writ of Certiorari.

B. Summary Of The Facts Relevant To The Determination Of "Withdrawal Liability"

The facts presented at the first hearing on "liability,' as stipulated to, in part, by the parties, and as subsequently found and affirmed by the District Court, the Court of Appeals, the arbitrator, and again the District Court and Court of Appeals are summarized below, supplemented by references to the Depositions of Messrs. Navas and Street, who were executive officers of Concrete Pipe at the relevant times. (The Depositions of Navas and Street were admitted into evidence at the arbitration hearing, admitted respectively as Fund Exhibit 2 and Joint Exhibit 4. The Stipulated Facts were admitted into evidence at the first arbitration hearing as Joint Exhibit 2.)

On November 30, 1976, Concrete Pipe purchased a plant for the manufacture of concrete pipe located in Shafter, California, from Cen-Vi-Ro Concrete Pipe & Products Company. Upon

purchase, Concrete Pipe honored the terms of the collective bargaining agreement between the former owner and the Southern California District Council of Laborers. This agreement required that the owner of the plant make contributions to the Trust's pension plan for each hour worked by covered employees. (Stipulated Facts, White CR-49, ¶¶7-9.)

On November 27, 1978, Concrete Pipe itself signed a new collective bargaining agreement with the Southern California District Council of Laborers, which likewise required contributions to the Trust for each hour worked by employees of the Shafter Plant. This new agreement provided for automatic renewal, unless the parties gave notice of a desire to renegotiate its terms prior to June 30, 1981, or prior to June 30 of each yew thereafter. (*Id.*, ¶9.)

Up until August 1979, the Shafter Plant was in full and continuous production of concrete pipe. However, from August 1979 to November 1981, Concrete Pipe temporarily suspended production at the plant. (*Id.*, ¶¶15-16.)

Concrete Pipe made its last contributions to the Trust in May of 1980. (*Id.*, ¶¶18-20.) However, during the entire period that the plant was idled from August of 1979 through November of 1981, Concrete Pipe maintained full-time employees at the Shafter Plant as caretakers who maintained the premises, worked in the pipe storage yard, and loaded and handled pipe. (*Id.*)

Throughout the period of August 1979 through November 1981, Concrete Pipe continued to diligently search for additional work in the Shafter-Bakersfield area by sending salesmen into the area on a regular basis. (Navas' Depo., Fund Exhibit 2, pp. 74-77; Street Depo. pp., Joint Exhibit 4, 35-37, 54-55, 59-62.)

In the fall of 1981 these efforts paid-off and Concrete Pipe was the successful bidder on a project known as Wheeler Ridge in the Bakersfield area. It was awarded two of the four contracts it bid on for the project, for a total of approximately 7,000 tons of concrete pipe. The plant was then reopened and put back into full production in November 1981, and the Shafter plant then employed persons within the classification of laborers covered by the scope of the 1978 to 1981 collective bargaining agreement between Concrete Pipe and the Laborers' Union. (Stipulated Facts, White CR-49, ¶¶15, 21.)

The plant stayed in full production into 1982, producing approximately 7,000 tons of concrete pipe. The plant was then

shut down again in 1982. As testified to by Stanley Navas, President of Concrete Pipe, "[We s]hut the plant down in August of 1979. We reactivated it temporarily in November, 1981. Deactivated it *permanently* in November or December, *1982*. 1 believe that date is November, the record will show that." (Navas Deposition, pp. 11, 13-23. Emphasis added. See also pp. 48-50.)

While Concrete Pipe was looking for work in the Bakersfield area, in April and May of 1981, both the Laborers' Union and Concrete Pipe gave each other notice that they desired to renegotiate the collective bargaining agreement for the Shafter Plant. (Stipulated Facts, CR-49, ¶¶11-12.)

During October and November of 1981, Concrete Pipe and the Laborers Union, together with various other unions, negotiated towards a new agreement. (*Id.*, ¶13.) During November of 1981, while union contract negotiations were ongoing, the Shafter plant resumed full production and hired employees within the categories covered by the Laborers Union's collective bargaining agreement and for whom Concrete Pipe would be required to make contributions to the Trust. (*Id.*, ¶¶15 and 21.)

At the end of November, specifically on November 30, 1981, Concrete Pipe gave notice that an impasse in negotiations had been reached and "withdrew recognition" of the unions, including the Laborers Union, thereby giving notice of the termination of the collective bargaining agreement, which under its terms was terminable on 15 days written notice. (*Id.*, ¶13, Ex. C.) Therefore, the effective termination date of the collective bargaining agreement was December 15, 1981.

The Trust contends in this arbitration that Concrete Pipe's termination of the collective bargaining agreement, effective December 15, 1981, caused the permanent cessation of Concrete Pipe's "obligation to contribute' to the Trust's pension plan, and therefore constituted a "complete withdrawal," subjecting Concrete Pipe to withdrawal liability under MEPPAA, and requiring it to pay its share of the unfunded vested liability of the plan for employee retirement benefits.

Based on that termination of the collective bargaining agreement, on January 20, 1982, the Trust sent Concrete Pipe notice that it was liable for withdrawal liability for its share of the pension plan's unfunded vested benefits. (*Id.*, ¶22, Ex. D.)

Concrete Pipe then refused, and continues to refuse, to pay any part of its withdrawal liability, contending that MEPPAA is

unconstitutional and also that it effected a complete withdrawal from the plan prior to the September 26, 1980, effective date of MEPPAA when it temporarily idled its plant in August 1979.

The facts as found by the arbitrator are set out on pages 3 through 6 of his August 1987 decision on the first arbitration session. (Decision of Arbitrator, Blue CR-1, Ex. A.) As the key factual determination, the arbitrator found that "Concrete Pipe did not permanently close its Shafter plant in 1979 but simply 'mothballed' the facility pending an increase in business as a result of which it reopened its plant and hired employees in classifications covered by the Labor Agreement." Accordingly, the arbitrator found Concrete Pipe liable under MEPPAA for withdrawal liability.

III. ARGUMENT

A. Since MEPPAA Expressly Provides That "Any Dispute Between An Employer And The Plan Sponsor Concerning A Determination [Of Withdrawal Liability] Shall Be Resolved Through Arbitration." The District Court Was Correct In Requiring The Parties To Submit The Issue Of The Date Of Complete Withdrawal To Arbitration Because Of The Need To Resolve Conflicting Factual Inferences, Regardless Of Whether That Date Was Before Or After The Effective Date Of MEPPAA.

In March of 1984, both parties initially sought to have Judge Lucas decide the issue of when Concrete Pipe withdrew from the Trust. The parties filed extensive stipulations of undisputed facts. However, Judge Lucas[1] properly noted that even though the underlying facts were not in dispute between the parties, those facts raised sharply conflicting inferences that were the very heart of the dispute between them. As stated by the District Court:

> "In specific terms, the factual question is this: Did Concrete Pipe permanently close its Shafter plant in 1979, as Concrete Pipe maintains, or did it, as the Pension Trust argues, simply 'mothball' the facility pending its relocation elsewhere in the Union's jurisdiction or pending an increase in business such as apparently occurred in 1981?"

Because of these conflicting inferences, the Court held that the arbitrator in the first instance had to determine the fact of when withdrawal took place. (Order Compelling Parties to Submit to Arbitration, White CR-68, p. 5.)

Concrete Pipe contends that Judge Lucas erred in requiring it to arbitrate the issue of the date it withdrew from the Trust.

However, MEPPAA expressly provides that "Any dispute between an employer and the plan sponsor concerning a determination made under section 1381 through 1399 of this title shall be resolved through arbitration." 29 U.S.C. §1401(a)(1) (emphasis added). Section 1381 through 1399 establish withdrawal liability and provide the methods of determining and collecting it.

Judge Lucas correctly held that it did not make any difference if Concrete Pipe was contending that the date of withdrawal was prior to the enactment of MEPPAA. If there is a dispute regarding the date of withdrawal, whether before or after the effective date of the act, that dispute must be arbitrated. As explained by another District Court upon which Judge Lucas relied:

> "Schulze [the employer] argues that if it had no obligation to contribute to the Plan after the effective date of the Act, then the Act's arbitration procedures do not apply. . . . The Plan trustees have determined that Schulze withdrew from the Plan on December 12, 1980. Schulze disagrees. This is 'a dispute . . . concerning a determination made under sections 1381 through 1399 . . .' 29 U.S.C. §1401(a)(1). If a dispute between an employer and a plan sponsor were to arise over whether withdrawal occurred in December 1980, or January 1981, the dispute would clearly be subject to the arbitration procedures of the Act. This result should not change because the employer happens to be arguing for a date preceding the effective date of the Act."

I.A.M. Nat'l Pension Fund v. Schulze Tool & Dye Co., 564 F. Supp. 1285, 1289-90 (N.D. Cal. 1983).

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[1] Judge Malcolm M. Lucas is now the Chief Justice of the California Supreme Court.

Since Judge Lucas's ruling in 1984, the Ninth Circuit has ruled on this issue in *Teamsters Pension Trust Fund Board of Trustees v. Allyn Transportation Co.*, 832 F.2d 502 (9th Cir. 1987). In the *Allyn* decision, the Ninth Circuit panel was faced with the same question presented here. As stated by the Court:

> "Allyn's contention in the district court and in this Court is that whether a 'complete withdrawal,' within the meaning of 29 U. S. C. §1383, occurred before the effective date of MPPAA, is a question for the Court, not an arbitrator, to decide: (1) because the question is one of statutory construction-a pure question of law; and (2) because the question is whether Allyn was subject to MPPAA at the critical time and therefore under any duty to arbitrate at all."

Id. at 504.

The *Allyn* Court then expressly rejected the employer's contention that whether it withdrew before the effective date of MEPPAA must be decided by a Court before arbitration is initiated. *Id.* at 505. As the Court stated:

> "[T]he statute states unambiguously that '[a]ny dispute between an employer and the plan sponsor . . . concerning a determination made under sections 1381 through 1399 . . . shall be resolved through arbitration' (29 U.S. C. ¶1401 (a)(1)), and Congress clearly intended exactly what those words import."

Id. at 505-06 (emphasis in original). *Accord, I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 422 (D.C.Cir. 1987) (whether withdrawal preceded effective date of MEPPAA should have been arbitrated); *Warner-Lambert Co., Inc. v. United Retail & Wholesale Employee's Teamsters Local No. 115 Pension Plan*, 791 F.2d 283, 287-88 (3d Cir. 1986) (upholding referral to arbitration of dispute over whether the employer had withdrawn before the effective date of MEPPAA); *Woodward Sand Co. v. Western Conference Of Teamster Pension Trust Fund*, 789 F.2d 691, 695-96 (9th Cir. 1986) (criticizing lower court for not presuming correctness of arbitral finding that employer had not withdrawn until after MEPPAA's effective date).

Just as in the *Schulze* and *Allyn* cases, the dispute in the present case of when withdrawal occurred must also be arbitrated

pursuant to section 1401(a)(1), despite Concrete Pipe's contention that the withdrawal date was prior to the effective date of the act. On the one hand, Concrete Pipe contends it withdrew from the plan in August 1979, prior to the effective date of September 26, 1980. On the other hand, the Trust contends that the withdrawal instead occurred in December 1981, long after the effective date of MEPPAA. Therefore, the above reasoning of *Schulze* and *Allyn* is applicable here, and the initial determination of the withdrawal date was correctly made in the mandatory arbitration proceeding provided for in the enforcement scheme of MEPPAA.

Next, once it is decided that the dispute as to the withdrawal date falls under the arbitration requirement of MEPPAA, it is then necessary to look more closely at the nature of the exhaustion requirement imposed. As noted in *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri-Industries*, 727 F.2d 1204 (D.C.Cir. 1984), two different exhaustion of remedies requirements exist under federal law. First, there are those that are "statutorily specified jurisdictional prerequisites," and second, there are those that are judicially imposed and basically reflect prudential concerns. *Id.* at 1208.

The *Tri-Industries* Court, and others that have addressed the issue, have uniformly held that the arbitration requirement under MEPPAA falls under the second of these categories, requiring exhaustion of the arbitration remedy as a prudential matter. *Id.* at 1208; *Schulze*, 564 F.Supp. at 1293.

The Courts go on to hold that unless there is an applicable exception to the 'prudential" exhaustion requirement, arbitration should always be required. As stated by one Court in reviewing the arbitration requirements of MEPPAA:

> "If the statutory schema mandates exhaustion of an administrative remedy, and if that remedy is adequate in its furtherance of the policies behind the doctrine, then only in extraordinary circumstances, when the complaining party satisfies one of the narrow exceptions to the doctrine, should the Court excuse exhaustion."

Republic Indust. v. Central Penn. Teamsters Pension Fund, 693 F.2d 290, 294 (3d Cir. 1982).

As stated by another Court in deciding whether to compel arbitration under MEPPAA, the basic exceptions to the exhaustion doctrine are (1) where irreparable injury will result prior to Court

review, (2) where only issues of statutory interpretation are involved, (3) where antitrust claims are involved, and (4) where issues of constitutional dimension are involved. *T.I.M.E.-D.C., Inc. v. Trucking Employees of North Jersey Welfare Fund*, 560 F.Supp. 294, 302 (E.D.N.Y. 1983).

In the present case, Concrete Pipe contends that the District Court should have determined the date of withdrawal itself, and then only if it found that the withdrawal date was after the effective date of MEPPAA should the matter have then been sent to arbitration. Reviewing the above list of the four exceptions to the exhaustion doctrine, the only one which appears to have any possible application in the present case to determining the withdrawal date is the second one of statutory interpretation.

Where the issue is indeed "*purely* one of statutory interpretation," exhaustion need not be required by a Court. *Tri-Industries*, 727 F.2d at 1210. However, such a situation exists only where there is no factual dispute of any kind between the parties, and the issue is therefore one of law hinging solely on the interpretation of a statute. Such a situation existed in the *Tri-Industries* case, and the Court found exhaustion of the arbitration remedy unnecessary "[b]ecause there are neither questions of fact nor issues of contractual interpretation to resolve [and therefore] an arbitrator skilled in pension and labor matters would have no superior expertise to offer." *Id.* at 1210.

On the other hand, where, as in the present case, the facts (or mixed questions of law and fact) to which a statute needs to be applied are disputed, exhaustion of the arbitration remedy is required:

> "If, for example, a challenge were founded upon a particular question of law and fact, *e.g.*, whether a 'withdrawal' has occurred, or whether a party was an 'employer' within the meaning of the Act, prior adjudication by the arbitrator would be an appropriate prerequisite."

Dorn's Transportation, Inc. v. I.A.M. Pension Fund, 578 F.Supp. 1222, 1226 (D.C. 1984).

Similarly, in *Republic* the Court was faced with determining whether two terminals, one of which closed prior to the effective date of MEPPAA, were one "facility" under the act, thereby making both liable for withdrawal liability where the second terminal closed after the effective date. The Court held that this

was a mixed question of law and fact that under MEPPAA had to be decided by an arbitrator:

> "It seems to us that whether the two terminals represented Richmond facility or whether the surviving terminal became a covered facility after the five employees who were beneficiaries of a benefit plan were transferred to it is a nice question of fact and law. We have no doubt that the scheme of the 1980 Act is to require such a question to be decided by an arbitrator rather than a Court."

Republic, 718 F.2d at 635 (emphasis in original).

In the present case, Judge Lucas properly found that the conflicting factual inferences on whether the temporary suspension of operations at the plant in August 1979 was "permanent" within the meaning of MEPPAA was a mixed question of law and fact that required resolution in the first instance by the arbitrator as the trier of fact. The appropriate role for the District Court then became as a reviewer of the arbitrator's application of MEPPAA to the facts, with the important difference being the requirement of giving due deference to the arbitrator's findings of fact, just as was done by Judge Hupp when he was later asked to confirm or vacate the arbitrator's award.

Finally, the cases cited by Concrete Pipe on page 9 of its Petition for Writ of Certiorari do not provide authority to the contrary. It is correct that whether a dispute is subject to arbitration is an issue for judicial determination. However, that is exactly what happened here. The District Court did correctly make a judicial determination that the dispute was arbitrable.

Once it was determined by the District Court that this was indeed "a dispute . . . concerning a determination made under sections 1381 through 1399 . . ." (29 U.S.C. §1401(a)(1)), that is, a dispute regarding the collection of withdrawal liability, the Court necessarily also determined that the dispute was arbitrable. It is irrelevant, as pointed out by the above cases, whether the disputed withdrawal date was before or after the Act; the dispute is nevertheless one over withdrawal liability, which is subject to arbitration in the first instance, regardless of the actual date of withdrawal.

In conclusion, the District Court's decision to order the dispute regarding withdrawal liability to arbitration should be upheld and

the present Petition denied.

B. Since The Section 1401 Presumptions In Favor Of The Trust Only Allocate The Burden Of Proof On The Employer To Show That The Trust's Determinations Are Unreasonable, And Do Not Deprive The Employer Of Its Right To Fully Challenge Those Determinations Before An Impartial Arbitrator And The Court, The Presumptions Comply Fully With Procedural Due Process Requirements, Including Providing An Impartial Decision-Maker.

Concrete Pipe contends that the statutory presumptions contained in 29 U.S.C. section 1401(a)(3) that require the employer to shoulder the burden of proof in attacking a determination of withdrawal liability violate procedural due process.

However, the controlling case below for the Ninth Circuit of *Board of Trustees v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1403-04 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054, upholds the constitutionality of the section 1401 presumptions attacked by Concrete Pipe. All of the other circuits that have ruled on the issue, except one, are in accord with the Ninth Circuit. *Accord, Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1137, 1146 (1st Cir. 1985); *The Washington Star Co. v. International Typographical Union Pension Plan*, 729 F.2d 1502, 1511 (D.C.Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir. 1984), *cert. denied*, 104 S.Ct. 3554; *Terson Co. v. Bakery Drivers & Salesmen* Local 194, 739 F.2d 118, 121 (3d Cir. 1984); *Republic Industries, Inc. v. Teamsters*, 718 F.2d 628, 640-41 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 1553.

In his decision in the District Court, Judge Hupp found *Thompson* to be controlling and its facts indistinguishable from the present case. Based thereon, he rejected Concrete Pipe's constitutional attack on the 1401 presumptions. (Order re Cross Motions to Vacate/Modify/Confirm Arbitration Award, White CR-127 at 3.)

The sole aberrational case of *United Retail v. Yahn*, 787 F.2d 128 (3d Cir. 1986), has found the presumption unconstitutional. In that case, the Court failed to analyze the "presumption," as the other circuits correctly have, as simply putting the burden of proof

on the employer to show that the imposition of withdrawal liability is correct. *Yahn's* analysis would only make sense if the "presumption' was irrebuttable, which of course it is not.

As an ordinary rebuttable presumption affecting only the burden of proof, there is nothing constitutionally suspect. As the Court knows, evidence law is full of many such rebuttable presumptions. The employer simply has to meet the burden of proof on the issue, rather than the pension plan.

The leading United States Supreme Court case on the constitutionality of rebuttable presumptions in civil cases is *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed. 752 (1976). In *Usery*, noting the low scrutiny analysis applicable to civil economic legislation, the Supreme Court upheld as constitutional statutory presumptions placing the burden of proof on employers to show that long-term coal miners with black lung contracted the disease from causes outside their employment. *Id.* at 28-32.

Also on point is *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). In *Dick*, the Supreme Court upheld against constitutional attack a state statutory presumption that shifted the burden of proof to an insurance company to prove that the death of an insured was due to suicide. *Id.* at 443-46.

The section 1401 presumption is simply and only a constitutional allocation of the burden of proof onto a withdrawing employer to show that the amount of withdrawal liability sought is unreasonable. As explained by the Court in the *Republic* case (the reasoning of which the Ninth Circuit expressly agreed with in *Thompson*, 749 F.2d at 1404):

> "In making factual determinations . . . as well as the amount of the employer's withdrawal liability, a decision of the trustees is subject to arbitration, and the decision of the arbitrator, to judicial review. We reject Republic's argument that such review is essentially meaningless. It is true that the MPPAA makes the trustees' decision presumptively correct, §1401(a)(3)(A), and provides that the decision of the arbitrator is also presumptively correct and may be rebutted only by a clear preponderance of the evidence, §1401(c). *Read together, however, these provisions do little more*

> *than allocate the burden of proof to the challenger* and direct that issues which are close be resolved in favor of the nonjudicial dispute resolver. *In this we perceive no evident unfairness*. We do not think, as Republic argues, that an employer cannot obtain effective judicial review of the arbitrator's legal rulings."

Republic, 718 F.2d at 641 (emphasis added).

Such an allocation of the burden of proof requiring a showing that the determination is unreasonable or clearly erroneous is no more unconstitutional than typical state law provisions requiring the proving of fraud by "clear and convincing" evidence. Similarly, the allocation of the burden onto the employer (rather than the Trust) is no more unconstitutional than requiring a defendant to prove "affirmative defenses" in common law cases.

Furthermore, the Courts of Appeals that have addressed the issue have expressly held that the trustees, half of whom are selected by unions and the other half of whom are selected by multi-employer associations, do not suffer from any institutional bias which constitutionally affects their initial determination of withdrawal liability. *Textile*, 725 F.2d at 855; *Republic*, 718 F.2d at 640.

In conclusion, Judge Hupp's and the Ninth Circuit's decision upholding the constitutionality of the allocation of the burden of proof on the employer under section 1401(a)(3) should be affirmed and the present Petition denied.

C. Since There Is Substantial Evidence To Support The Arbitrator's Conclusion That Concrete Pipe Withdrew From The Trust In December 1981 When It Terminated Its Collective Bargaining Agreement, And Not When It Temporarily Idled Its Plant In August 1979, The District Court Correctly Confirmed The Arbitrator's Finding That Concrete Pipe Withdrew After The September 1980 Effective Date Of MEPPAA.

The following four subsections address fully the reasoning process of the Courts and the arbitrator below in which they determined that Concrete Pipe withdrew from the Trust's plan after the effective date of MEPPAA.

In section D of its Petition, Concrete Pipe appears to attempt

to attack the finding of the date of withdrawal in a vacuum that leaves out virtually all of the exhaustive decision-making process accorded this issue below, characterizing the process, without support or explanation, as a "wait and presume approach." (Petition, pp. 14-16.)

1. By Terminating Its Collective Bargaining Agreement In 1981, Concrete Pipe Effected A Complete Withdrawal Pursuant To §1383(a)(1) Because It Then Permanently Ceased To Have An Obligation To Contribute To The Plan.

First, any factual findings made by the arbitrator are presumed correct. As stated by 29 U.S.C. §1401(c):

> "In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct."

Of course, this standard of review is similar to the general appellate standard of review of any evidence originally presented to any lower tribunal. In other words, if there is evidence in the record to support the factual findings, the appellate inquiry as to the facts stops there. This "clearly erroneous" standard of review is well established as a part of appellate review law. *See* Wright and Miller, *Federal Practice and Procedure* ¶2585.

As noted by Wright and Miller, under the "clearly erroneous" test the reviewer does not weigh the evidence de novo. Instead the reviewer simply looks to see if the finding is supported by substantial evidence. The mere fact that on the same evidence someone else might reach a different result does not justify setting the original findings aside. A finding may be found to be clearly erroneous only if it is without adequate evidentiary support. Wright and Miller, *Federal Practice and Procedure*, ¶2585 at pp. 733-34. In the present case, the evidence before the arbitrator fully supports his factual finding that Concrete Pipe is liable for withdrawal liability.

More specifically, the Stipulated Facts show a "complete withdrawal' by Concrete Pipe, as that term is defined by MEPPAA under 29 U.S.C. §1383(a)(1), on December 15, 1981, when it terminated its collective bargaining agreement, over a year after

the September 26, 1980, enactment and effective date of MEPPAA. Pursuant to §1381(a), that complete withdrawal in December 1981 made Concrete Pipe liable to the Trust for the payment of withdrawal liability—its share of the unfunded vested liability of the Trust to the beneficiaries at the time of the withdrawal.

On the other hand, Concrete Pipe erroneously contends that it effected a complete withdrawal from the Trust's plan under 29 U.S.C. §1383(a)(2) when it *temporarily* suspended production of pipe at the Shafter Plant in August of 1979, prior to the September 26, 1980, effective date of MEPPAA. Concrete Pipe so contends despite the language of §1383 (a)(2) that requires that an employer must "*permanently* cease all covered operations under the plan" in order to accomplish a complete withdrawal.

The arbitrator found that Concrete Pipe's contention had no merit since the facts showed that Concrete Pipe went back into full production in November of 1981, negating any finding of a *permanent* cessation of operations prior to the effective date of the act. Therefore, withdrawal liability was triggered when Concrete Pipe's obligation to contribute ceased at the time it terminated its collective bargaining agreement with the Laborers Union, after the effective date of the act.

Turning now to a more detailed analysis of the statutory language, first, 29 U.S.C. §1381(a) provides that an employer becomes liable for "withdrawal liability" when the employer effects a "complete withdrawal" from a multi-employer plan.

Section 1383(a) then defines "complete withdrawal":

> "For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—
>
> (1) "*Permanently* ceases to have an obligation to contribute under the plan, *or*
>
> (2) "*Permanently* ceases all covered operations under the plan."

(Emphasis added.)

Concrete Pipe's contention that it withdrew from the plan under §1383(a)(2) by temporarily suspending production in August 1979 flies in the face of the express words of the section quoted above that requires a *permanent* cessation of covered operations to constitute a complete withdrawal. Since the undisputed facts in this case show that the plant resumed full production in November

and December of 1981, there was simply no *permanent* cessation of covered operations prior thereto. Therefore no "complete withdrawal" under §1383(a)(2) occurred in August of 1979 when the plant was temporarily idled.

Consequently, Concrete Pipe had not yet withdrawn from the plan when it later terminated its collective bargaining agreement on December 15, 1981, which then became the date of "complete withdrawal," thereby triggering withdrawal liability under section 1383(b)(1).

Since the controlling event here is the termination of the collective bargaining agreement, the controlling provision of MEPPAA is instead §1383(a)(1), which provides that there is a complete withdrawal when there is a permanent cessation of an employer's "obligation to contribute" to a plan. "Obligation to contribute" is defined in 29 U.S.C. §1392(a) as an obligation "arising . . . under one or more collective bargaining (or related) agreements."

In the present case, Concrete Pipe's "obligation to contribute" to the Trust arose under Concrete Pipe's November 27, 1978, collective bargaining agreement with the Laborer's Union, which required contributions to the Trust. That collective bargaining agreement contained the following termination clause:

> "This Agreement shall remain in full force and effect until June 30, 1981, and then thereafter from year to year until either party hereto shall give notice in writing to the other party of a desire to change, modify, or terminate this Agreement. Such notice shall be given at least sixty (60) days prior to June 30, 1981, or June 30 of each year thereafter. If no agreement is reached by June 30, 1981, or June 30 or any year thereafter, the Employer or the Union may thereafter give written notice to the other than on a specified date not less than fifteen (15) days after the date of said notice, the Agreement shall be considered terminated."

(Stipulated Facts, White CR-49, 19.)

As noted in the Stipulated Facts, the signatory unions and Concrete Pipe all gave timely notice of their intent to renegotiate the collective bargaining agreement more than 60 days prior to June 30, 1981. (*Id.* at ¶¶11 and 12.)

Negotiations for a new contract were then held in October and November of 1981. (*Id.* at ¶13.)

Finally, on November 30, 1981, the attorney for Concrete Pipe wrote to the unions, stating: "At the current time, Concrete Pipe & Products has no basis in [sic] which to continue recognition of your unions as representative of its employees and must withdraw any such recognition." (*Id.* at ¶13, Ex. C.)

Therefore, Concrete Pipe's termination of the agreement was effective fifteen days after November 30, 1981, that is, on December 15, 1981. By that date the Shafter Plant was already back in full production and Concrete Pipe had already hired employees covered by the provisions of the plan, for whom it had an obligation to contribute to the Trust. (*Id.* at ¶¶15 and 21.)

Therefore, since the obligation of Concrete Pipe to contribute to the Trust ceased with the termination of the collective bargaining agreement, a complete withdrawal occurred on December 15, 1981, the date upon which Concrete Pipe "permanently cease[d] to have an obligation to contribute under the plan," which was over a year after the September 26, 1980, enactment and effective date of MEPPAA.

2. Any Subjective "Intent" Of Concrete Pipe To Make Its Temporary Idling Of The Plant In August Of 1979 "Permanent" Is Irrelevant. Permanence Is Determined By The Objective Facts, And Concrete Pipe's Going Back Into Full Production In November And December Of 1981 Made The Idling Of The Plant In August Of 1979 Only A Temporary Suspension Of Operations.

The arbitrator expressly found that Concrete Pipe did not intend to permanently close its Plant in August of 1979, but instead intended only to temporarily "mothball' it until more business could be found. (Decision of Arbitrator, August 26, 1987, Blue CR-1, Ex. A, p. 14.) As a factual finding, Arbitrator Schwartz's finding of intent is entitled to the deferential appellate standard of review and should therefore not be set aside unless clearly erroneous. (See page 3, 23 for a discussion of the applicable standard of review for factual findings.) Judge Hupp then confirmed the arbitrator's decision that the idling of the plant in 1979 was not permanent.

At the arbitration, in an attempt to get around the express

words of the statute requiring a permanent cessation of covered operations for a complete withdrawal, Concrete Pipe contended that at the time it idled its plant in August 1979, it 'intended' that the closure be permanent. Concrete Pipe's argument continued that since the idling of the plant in August of 1979 was intended to be permanent, it was permanent within the meaning of §1383(a)-(2), despite the later resumption of full production in November 1981.

As noted above, the arbitrator found that Concrete Pipe actually intended the idling to be temporary; however, even if the arbitrator had found that Concrete Pipe had intended a permanent closure in 1979, the result would be the same because the employer's subjective intent is irrelevant in determining whether a cessation of covered operations is permanent.

In *United Food & Commercial Workers Int'l Union-Industrial Fund v. G. Bartusch Packing"*, 546 F.Supp. 852 (D.Minn. 1982), the Court held that the intent of an employer as to the permanence of any cessation of covered operations is irrelevant in determining whether a complete withdrawal has actually taken place under MEPPAA. In that case, the employer had closed its plant prior to the effective date of MEPPAA, having laid off indefinitely all of its employees. Depressed market conditions and the lack of financing were the causes of the plant's closing. It was conceded that at the time of closing its plant, the employer *intended* that the closure be *temporary*. In fact, the company actively sought financing and solicited new business in an attempt to reopen the plant. However, despite the company's best efforts, the plant never reopened, none of the employees were hired back, and the closure therefore became permanent.

The pension plan there contended that a complete withdrawal had not occurred prior to the effective date of MEPPAA because the employer had intended that the closure of its plant be temporary at the time he initially ceased production, prior to the effective date of MEPPAA.

However, the Court disagreed and held that the employer's intent was irrelevant in determining whether there had been a *permanent* cessation of covered operations. *Id.* at 857-58. As stated by the Court:

> "It is true that defendant did not intend to permanently cease its covered operations when it closed its plant and laid off its employees in April of

> 1979. Neither MEPPAA nor its legislative history discusses whether intent is an element of complete withdrawal. But the purpose and policy of the act suggest that applying MEPPAA to an employer who ceased covered operations prior to the effective date of the act and never resumed them would be unwarranted even though that employer did not initially intend to permanently cease covered operations."

Id. at 857.

As further stated and summarized by the Court: "Regardless of its intention . . . the failure of the plant to ever reopen means that the initial closing was permanent." *Id.* at 856 n. 6.

In other words, permanent cessation is determined by the objective, real-world facts. If, as in *Bartusch*, a plant never reopens, the cessation of operations was permanent. On the other hand, if the plant reopens, as in the present case, the cessation of operations was *not* permanent. Intent is irrelevant. *Accord, I.A.M. National Pension Fund v. Stockton Tri-Industries*, 727 F.2d 1204, 1211 (D.C. Cir. 1984) ('The statutory definition of "complete withdrawal," in terms of cessation of an obligation, makes [the employer's] expression of *intent to withdraw* irrelevant to the determination of the date of actual withdrawal." (Emphasis in original.))

In conclusion, Concrete Pipe's contention that its alleged subjective intent to permanently close its plant in August 1979 somehow made a temporary suspension of production "permanent," even though in fact the plant went back into full production in 1981, has no merit. Under *Bartusch*, any such intent is irrelevant, if in fact it did exist. Since Concrete Pipe did in fact reopen its plant, the closure in 1979 was simply not permanent. Therefore, liability arose when it terminated its collective bargaining agreement in 1981, long after the September 1980 effective date of MEPPAA.

3. Even If Concrete Pipe's Intent Was Relevant In Determining Whether There Was A Permanent Cessation Of Covered Operations, The Evidence Showed That Concrete Pipe Intended That The 1979 Idling Of The Shafter Plant Be Temporary.

As noted above, the determination of the permanence of a cessation of operations under §1383(a)(2) does not rely upon the subjective intent of the employer. What counts is whether or not the cessation of covered operations was in fact permanent, or rather, as here, temporary.

However, even if Concrete Pipe's intent on whether the 1979 closure was going to be permanent was relevant, the evidence shows, as the arbitrator held and as Judge Hupp confirmed, that Concrete Pipe had every intent of making that closure temporary, in other words, that the idling of the plant in 1979 was not intended to be permanent.

As shown by Mr. Navas' deposition on pages 62-66 and 74-77 and Mr. Street's deposition on pages 35-37, 54-55, and 59-62, Concrete Pipe actively solicited business throughout Southern California in an attempt to reopen its plant after the temporary lull in production in August 1979. As part of these efforts, it sent salesmen into the Shafter-Bakersfield area to canvass for sales on a bi-weekly basis. Concrete Pipe then later looked for new locations for the plant in order to resume production, and also repeatedly renewed its lease for the premises upon which the Shafter Plant sits.

Of course, the strongest factual inference supporting a finding that Concrete Pipe intended that the August 1979 closure be temporary is that drawn from the plant actually being put back into full production as soon as Concrete Pipe was able to make a sale in the area, that is, in November and December of 1981 when it was awarded two out of four contracts it had bid on for the Wheeler Ridge project. Also, throughout the idle period, Concrete Pipe maintained full-time employees at the Shafter Plant as caretakers to maintain the premises, work in the pipe storage yard, and load and handle the pipe. (Stipulated Facts, White CR-49, ¶¶18 and 19.)

In conclusion, based upon the facts before him, the arbitrator found that a complete withdrawal did not take place pursuant to §1383(a)(2) when Concrete Pipe temporarily idled its plant in

August of 1979. He instead found that complete withdrawal took place pursuant to §1383(a)(1) when Concrete Pipe terminated its collective bargaining agreement in December of 1981, thereby permanently ceasing its obligation to contribute to the plan and becoming liable for withdrawal liability.

Therefore, the arbitrator's finding that Concrete Pipe did not intend to permanently close the Shafter Plant in 1979 is fully supported by the evidence and Judge Hupp's decision to confirm that award and the Ninth Circuit's affirmance should be upheld and the present petition should be denied.

D. MEPPAA Constitutionally Modified Contract Rights In An Area Already Subject To Extensive Prior Economic Regulation, And Therefore, There Was No Violation Of Substantive Due Process Or Of The Taking Clause.

Despite two United States Supreme Court opinions upholding MEPPAA against attack under the Due Process and Taking Clauses of the Fifth Amendment, Concrete Pipe continues to contend that the act is unconstitutional on those grounds.

First, in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717, 104 S. Ct. 2709, 81 L.Ed.2d 601 (1984), the Supreme Court held that the retroactive application of the withdrawal liability provisions of MEPPAA did not violate the Due Process Clause of the Fifth Amendment. *Id.* 467 U.S. at 734. Due to the nature of MEPPAA as economic legislation, the Court held that low scrutiny applied for substantive due process analysis. In other words, all that needed to be shown was that the legislation was 'justified by a rational legislative purpose." *Id.* 467 U.S. at 730.

In *Gray* the Supreme Court upheld MEPPAA's original provision of a 5-month retroactive period preceding enactment against substantive due process attack. The act has since been amended to remove the 5-month retroactive period, thereby making the act even less subject to due process attack.

Second, in *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986), the Supreme Court held that the imposition of withdrawal liability did not constitute compensable taking under the Taking Clause of the Fifth Amendment. *Id.* 475 U.S. at 224, 228. In *Connolly* the Supreme Court noted that the United States has taken nothing for

its own use under MEPPAA. Instead, it has only nullified a contractual provision limiting liability by imposing an additional obligation that is within Congress' power to impose. *Id.* 475 U.S. at 221-224.

The *Connolly* Court then went on to analyze three factors to be considered in determining whether there was a "taking" under the Taking Clause: (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Id.* 475 U.S. at 22527.

In applying the first factor on the character of the governmental action, the Court noted:

> "First, with respect to the nature of the governmental action, we already have noted that, under the Act, the Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation."

Id. at 225.

On the second prong regarding the severity of the economic impact, the Court noted:

> "Next, as to the severity of the economic impact of the MPPAA, there is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability. The assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions."

Id. at 225.

On the third factor of interference with expectations, the Court noted that pension plans have long been the subject of heavy

federal regulation and that the imposition of withdrawal liability did not upset reasonable expectations since various forms of withdrawal or plan termination legislation had been previously passed, and frequently considered. Citing *Gray*, the Court noted:

> "Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations."

Connolly, 475 U.S. at 228.

Quoting from an earlier Supreme Court decision, the Court then concluded:

> "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."

Id.

Finally, it is not correct for Concrete Pipe to contend that none of the Trust's unfunded vested liability is attributable to it. ERISA only requires a withdrawing employer to pay its proportionate share, based upon its own contributions to the plan as compared to the total contributions, of the unfunded vested liability at the time it withdraws. Such a connection, of course, easily satisfies the furtherance of a rational purpose required under a substantive due process analysis of economic legislation. Obviously, it would not be practicable to trace each employee of Concrete Pipe over the following decades to see which became vested at various times.

Instead, it was a reasonable alternative to make each withdrawing employer liable for its own proportionate share of the plan's total unfunded vested liability at the time it withdrew (and for which it would have been responsible had it remained in the plan).

In conclusion, the Supreme Court holdings in the *Gray* and *Connolly* cases are controlling here, and therefore, this Court should also uphold the constitutionality of MEPPAA under the Due Process and Taking Clauses.

E. If The Court Denies The Petition, It Should Include In Its Decision An Award Of Attorney's Fees And Costs As Mandated By MEPPAA.

Should the Trust prevail in opposing this petition, an award of attorneys' fees and costs incurred by the Trust is mandated by 29

U.S.C. section 1132(g)(2)(D).

Where, as here, the employer has refused to make withdrawal liability payments to the pension fund, section 1401(d) provides that the payments shall be collected as delinquent contributions under section 1145.

Section 1132(g)(2) then sets out what may be recovered by a plan in a delinquent contribution collection case. That subsection provides:

> "In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court *shall* award the plan—
>
> "(A) the unpaid contributions,
>
> "(B) interest on the unpaid contributions,
>
> "(C) an amount equal to the greater of-
>
> "(i) interest on the unpaid contributions, or
>
> "(ii) liquidated damages . . . .
>
> "(D) *reasonable attorney's fees and costs of the action, to be paid by the defendant*, and
>
> "(E) such other legal or equitable relief as the court deems appropriate.'

(Emphasis added.)

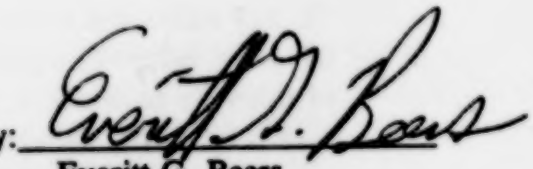
The cases have confirmed that an award of attorneys' fees to the plan sponsor is mandatory. First, *Lads Trucking Co. v. Board of Trustees of Western Conference of Teamsters Pension Trust Fund*, 777 F.2d 1371, 1375-76 (9th Cir. 1985), holds expressly that section 1132(g)(2) mandates an award of attorneys' fees to the prevailing plan. Second, *Woodward Sand Co. v. Western Conference of Teamster Pension Trust Fund*, 789 F.2d 691, 697-98 (9th Cir. 1986), holds that an award of any additional fees incurred by the plan sponsor during the appeal is also mandatory. Third, *Trustees of the Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 931-32 (9th Cir. 1986), holds that the award is mandatory if the Trust is awarded any part of the withdrawal liability it seeks, even if it loses on some issues. *Geltman* also expressly holds that the mandatory award of fees applies to actions such as the present one to confirm an arbitration award.

Therefore, should the Trust prevail on this appeal, it should be awarded its reasonable attorneys' fees and other court costs on appeal by way of cost bill.

IV. CONCLUSION

The Trust respectfully urges the Court to deny Concrete Pipe's Petition for Writ of Certiorari.

COX, CASTLE & NICHOLSON

By: 
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Supreme Court, U.S.
FILED
MAY 15 1992
OFFICE OF THE CLERK

(3)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991
No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

v.

CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY ON PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did 29 U.S.C. § 1401 permit the district court to order the parties to arbitrate the question of statutory interpretation which determines the existence of the arbitrator's and Court's jurisdiction?

2. Do the presumptions in 29 U.S.C. § 1401 favoring multi-employer plans like Construction Laborers Pension Trust for Southern California (hereafter "CLPT") violate the due process rights of Concrete Pipe and Products by denying access to an impartial decision maker?

3. Does 29 U.S.C. § 1383 permit respondent multi-employer plan to convert a pre-MPPAA complete cessation of the covered operations into a post-MPPAA withdrawal?

4. Do the provisions of the Multi-Employer Pension Plan Amendments Act (hereafter "MPPAA") violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied*, by retroactively imposing withdrawal liability on an employer who never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?

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I
INTRODUCTION

Petitioner Concrete Pipe and Products of California, Inc. ("Concrete Pipe and Products") submits this reply pursuant to Supreme Court Rule 15.6, and limits it to issues which affect the suitability of this case for review on the merits, pursuant to Supreme Court Rule 10. Much of the opposition brief is devoted to the merits of the case, and the parties clearly have significant disputes on the applicable legal principles and analysis. Petitioner's limitation of the reply to those points within the opposition brief which impact on the pending petition for writ of certiorari should not be construed as either a waiver or acquiesence in the characterization of the facts and issues in the opposition brief on the merits.

This reply will analyze those points applicable to the pending determination on the writ of certiorari in the same sequence and cross-referenced to the questions presented for review. The questions presented for review are duplicated for the court's convenience as page -i- in this brief. Concrete Pipe and Products submits that the opposition simply underscores the need for the Court to grant the pending petition and resolve the issues on the merits.

II
ARGUMENT

A. The Circularity of Various Courts' Analysis of the Jurisdiction Issue Supports Granting the Writ of Certiorari on the First Question Presented for Review.

Whether a court has the power to compel parties to arbitrate a dispute is clearly a question of jurisdiction, which, in this case, turns on the interpretation of 29 U.S.C. § 1401. The statute here requires arbitration of disputes "concerning a determination made under" 29 U.S.C. §§ 1381 through 1399. The question remains as to who determines whether a given dispute is "under" the identified statutory sections. In this case, the date Concrete Pipe and Products withdrew from the plan is outcome-determinative of whether this is a dispute "under" the statute. The parties obviously have a difference of opinion on this question with Petitioner favoring the district court and the Trust Funds favoring the arbitrator.

The Court should grant review to resolve this question and supersede the circular reasoning reflected in the lead case cited in opposition. *Teamsters Pension Trust Fund Board of Trustees v. Allyn*

Transportation Company, 832 F.2d 502 (9th Cir. 1987) clearly states the issues at page 504, but then decides the issue by begging the question. *Allyn Transportation* resolves the question in favor of letting the arbitrator decide by doing no more than quoting the statute and stating 'Congress clearly intended exactly what those words import.' *Id.* at 506.

Although Petitioner believes that this issue should be resolved by compelling the Court, in the first instance, to make such factual findings as are necessary to establish arbitrability, the state of the law in this regard should be clarified, and this case provides an opportunity to set forth some guidelines for determining those disputes which are arbitrable under 29 U.S.C. § 1401 (a).

B. The Court Should Grant Review of the Second Question Presented for Review Because the Constitutionality of the 29 U.S.C. § 1401 Presumptions Is As Unsettled Today As It Was in 1987.

The debatable constitutionality of the 29 U.S.C. § 1401 presumptions has not been resolved in the years since the question evenly divided this Court in *PBGC v. Yahn & McDonnell, Inc.,* 481 U.S. 735 (1987). By definition, four members of this Court believed that this issue was of sufficient importance to grant *certiorari* in *Yahn & McDonnell* on this issue in 1987. The opposition refers to the Third Circuit's decision in *United Retail and Wholesale Employees, Teamster Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.,* 787 F.2d 128 (3rd Cir. 1986) as a "sole aberrational case," but ignores the fact that three members of this Court voted to affirm that decision, three members of the Court voted to reverse, two members did not participate, and one seat was vacant.

It may be the case that the current composition of this Court will not find this issue to be as divisive as it was in 1987, but the issue and the split in the Circuits should be resolved.

C. The Court Should Grant Review of the Third Question Presented for Review to Resolve a Fundamental Question Regarding the Conduct which Constitutes a Withdrawal Under MPPAA and Reduce the Burden on Interstate Commerce.

The Petition and the Opposition, when read together, identify a significant problem with the definition of withdrawal under 29 U.S.C. § 1383. The opposition obscures the level of disagreement on the role which intent plays in this analysis. The arbitrator said he was finding

that intent was completely irrelevant to the permanent cessation of covered operations issue but nonetheless issued alternative findings, both of which relied heavily on findings of fact regarding intent. Judge Hupp disagreed with the arbitrator and found that intent was a relevant factor.

The Constitutional justification for ERISA (and, therefore, MPPAA) is the commerce clause. *See* 29 U.S.C. § 1003, *et seq.* The third question presented for review would permit the Court to clarify the circumstances under which employer conduct constitutes a permanent cessation of covered operations. Resolving this issue would also give guidance to plan fiduciaries and those employers who may be contemplating the "recycling" of prior facilities. If any subsequent operations at a previously abandoned site can trigger withdrawal liability, those contemplating the investment of capital deserve fair warning if the goal of promoting the free flow of interstate commerce is to be achieved.

D. The Constitutionality of MPPAA, *As Applied*, Deserves Review Even Though the Opposition Is Generally Non-Responsive.

The opposition's reliance on *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984); and *Connolly v. PBGC*, 475 U.S. 211 (1986), is non-responsive and misleading. Both of these cases dealt with facial challenges to MPPAA.

Petitioner's challenges are to the statute *as applied to it*. Petitioner made an effort to deal directly with those issues which the concurring opinion in *Connolly* specifically said had not been addressed by this Court. These unresolved issues which are directly raised in this petition were among those identified in the concurring opinion as having the potential for constitutional infirmity in the appropriate factual circumstance. Concrete Pipe and Products believes that it has demonstrated its circumstances are precisely those about which the *Connolly* concurring decision was concerned.

The Court should grant the writ of certiorari as to this question to eliminate the uncertainty regarding the constitutionality of the statute as applied. Petitioner asserts that if there is room for constitutional challenge to the statute as applied to small and peripheral withdrawing employers, the facts of this case provide an opportunity for the Court to set forth appropriate guidelines. However, if the Court is of the opinion that the statute is constitutional even though it permits a pension plan to

seize virtually all of the assets of an employer with no vested employees in the plan, the Court should grant the pending writ of certiorari so that other litigants similarly situated to petitioner and respondent here do not consume resources on this legal question.

One area where factual inaccuracy in the opposition may impact on this Court's decision to grant or deny certiorari is the discussion on page 26 asserting that Concrete Pipe and Products cannot contend that none of the unfunded vested liability constituting the withdrawal liability assessment is attributable to Concrete Pipe and Products. The trust funds support this position by claiming it would be impractical to trace each employee of Concrete Pipe and Products "over the following decades to see which became vested at various times." *See* Opposition, p. 26. The problem with this factual assertion is that it completely mischaracterizes both the factual and legal character of withdrawal liability under the MPPAA scheme.

Withdrawal liability is, by definition, the allocable amount of unfunded *vested* benefits attributable to the withdrawing employer at the time of withdrawal. 29 U.S.C. §§ 1381, 1382. The statutory limitation of withdrawal liability to the recovery of a portion of unfunded vested benefits necessarily means that whether former employees vest in the future is completely irrelevant to the computation. In fact, the potential for future contingent liability for individuals who may become vested is not even part of the withdrawal liability calculation formula. Thus, it is absolutely correct as a factual and legal matter for Concrete Pipe and Products to note that none of the respondent Trust Funds' unfunded vested liability could be attributable to Concrete Pipe and Products' employees because none of those employees were vested. Since none were vested, none of the liability which the Trust Funds seek to assess could represent pension benefits payable to Petitioner's employees. Concrete Pipe and Products is, therefore, the ideal party to raise the constitutionality of the statute as applied to those employers who have no vested employees in the plan making.

III
CONCLUSION

Concrete Pipe and Products respectfully suggests that the opposition merely serves to confirm the appropriateness and the need to grant the pending writ and hear this case on the merits.

DATED: May 14, 1992

DIEPENBROCK, WULFF,
PLANT & HANNEGAN

By: _____
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Products of California, Inc.

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

No. 91-904

In The

Supreme Court of the United States

October Term 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Petition For Certiorari Filed December 3, 1991
Certiorari Granted May 26, 1992

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DOCKET ENTRIES

This case before the Court is a consolidation of three separate actions. Initially, Respondent Construction Laborers Pension Trust for Southern California ("CLPT") brought an action against Cen-Vi-Ro Concrete Pipe and Products Co., Inc. in the United States District for the Central District of California, Case No. 82-5184. At approximately the same time, Petitioner Concrete Pipe and Products Company of California ("CPP") brought an action against CLPT in the United States District Court for the Eastern District of California, which action was subsequently transferred to the United States District Court for the Central District of California, Case No. 83-0132. Case No. 83-0132 was consolidated under Case No. 82-5184.

The third action was brought by CPP against CLPT pursuant to 29 U.S.C. § 1401(b)(2) in the United States District Court for the Central District of California, Case No. 88-5759. Case No. 88-5759 was also consolidated under Case No. 82-5184.

At no stage in this case has the existence of the three separate actions presented substantive or procedural issues distinct from the merits of the case. The three actions were consolidated into one case, and it was the District Court's decision in this one consolidated case that was appealed to the United States Court of Appeals for the Ninth Circuit. To avoid confusion for the Court, the Docket Entries are listed separately under each of Case No. 82-5184, Case No. 83-0132, and Case No. 88-5759.

Case No. 82-5184

10/05/82	1.	Fld. complt. Issd summs.
		• • •
12/28/82	5.	Fld deft ANSWER TO COMPLAINT
		• • •
11/15/83	22.	Fld deft memo of Concrete Pipe & Products in supp of motn for S/J
11/21/83	23.	Not of mot fr S/J 12-5-83 10:00 a.m. Plaintiff
		• " •
11/15/83	26.	Mot fr S/J Defendant
	27.	Declaration of William Street, III
11/23/83	28.	Memo of P&A of construction laborers pension tr. fr So. Cal. in opp to concrete pipe & products co. of Cal. mot fr S/J pltf & contr-deft
		• • •
12/01/83	32.	Ord denhng x-mots fr S/J
		• • •
02/15/84	47.	Motn on Concrete Pipe & Products Co fr S/J. Defendant
		• • •
	49.	Stip of facts on x-motns fr S/J. Defendant Constructn Laborers

	50.	Declratn of Dennis R. Murphy re: Transcript of depos of Stanley R. Navas, William H. Street III & Benjamin Erhardt. Defendant Concrete Pipe
	51.	Notc of motn fr S/J; memo of P/A retnbl 3/19/84, 10AM. Defendant Constructn Laborers
	52.	Declratn of Patrick J. Morrison. Defendant Concrete Pipe
	53.	Notc of hrng on motn fr S/J retnbl 3/19/84, 10AM. Defendant Concrete Pipe
	54.	Memo in suppt of motn fr S/J. Defendant Concrete Pipe
		• • •
02/24/84	57.	Brief in opp to motn of Constructn Laborers Pension, etc. Defendant
	58.	Declaration of Dennis R. Murphy re transcript of depos of Stanley R. Navas, William H. Street III & exh to depo of Stanley R. Navas. Defendant
02/27/84	59.	Stmt of genuine issues of fact. Plaintiffs
02/28/84	60.	Memo of P/A in opp. Plaintiffs
		• • •
03/02/84	62.	Declaration of Dennis R. Murphy re: Transcript of depo of William H. Street, III. Plaintiffs
	63.	Reply brief of CP&P to Clplt's opp to motn fr S/J. Defendant

	64.	Reply to Concrete Pipe & Products Co's opp to. S/J. Plaintiffs
		* * *
	66.	MO: Cross motns for S/J tkn under submission.
		* * *
04/04/84	68.	ORD granting in part plft mt for S/J, denying deft Concrete Pipes mot fr S/J, & compel ptys to subm to arbitratn
04/03/84	69.	Notc of transf frm MML to HLH. MO
		* * *
05/04/84	71.	Fld deft's NOTC OF APPEAL to 9th Cir. C/A frm Ord ent 4/4/84.
		* * *
01/09/86	88.	FILING & SPREADING MANDATE OF THE 9TH CCA dismissing appeal. (ENT 1/22/86)
		* * *
12/22/88	112.	ORD tht actns 82-5184 & 88-5759 are consolidated
		* * *
05/05/89	118.	Notc & mot fr S/J or partl S/J pltf CLPT
	119.	Memo P&A in supp mot S/J etc pltf CLPT
05/17/89	120.	Opp to mot fr S/J etc pltf Concrete Pipe

	121.	Stmt of gen issues pltf Concrete Pipe
05/18/89	122.	Memo of opp to Concrete mot for S/J pltf
05/22/89	123.	Reply on CP&P mot for S/J etc pltf
05/25/89	124.	Ntc of ldging oridg rec of arb. plft
	125.	Opp to confirmatin nof arb award pltf
		* * *
07/05/89	127.	ORDER tht CPP is treated as petn to vacate arb awrd & is DENIED; Mot of CLPT to confirm arb award is GRANTED; to extent tht mot to confirm seeks to "modify" awrd, it is treated as a mot to vaçate & is DENIED; CLPT is to submit form of jgmnt (ENT 7-6-89) mld copies parties/w/ntc
08/04/89	128.	Deft in CV-82-5184-HLH, Pltf in CV-83-132-HLH & Plft/Petner in CV-88-5759-HLH, Fld Notc of Appl to 9th CCA frm ord re cross-mtns to vacate/modify/ confirm arib entrd 7-5-89, 7-10-89 in cases 82-5184-HLH, * * * , 88-5759-HLH and 83-132-HLH. $105.00 Flng & Doc Fees Paid.

Case No. 83-0132

10/06/82	1.	Fld cmplnt.
12/27/82	2.	Fld ans to complnt and counter-claim.

12/28/82	3.	Stpln re transfer of action; ORD thereon. (EDP) JS-6.
12/29/82		Orig file record w/crtfd cpy of transfer ord, & docket, sent to USDC, Central of CA.
1/10/83		Fld cc Ord of Transf, cc docket & cc ltr of transfer. Attys notified.
4/12/83	4.	Fld Ord (MML) (WMB) transfring actn to cal of Judge Malcolm M. Lucas fr all fur proceeding. notc parties.
4/3/84	5.	Notc of transfer of civ actn from caseload of Judge Lucas to caseload of Judge Hupp. MO
7/7/89	6.	MO: the Ord in CV82-5184-HLH and CV88-5759-HLH dtd 07/05/89 is also applicable to this case & the propsd Jdgmnt shld include this case number. [Ent 07/10/89] mld cpys, Notc. MD JS-6.
8/4/89		Deft in CV-82-5184-HLH, Pltf in CV-83-132-HLH & Pltf/Petner in CV-88-5759-HLH, Fld Notc of Appl to 9th CCA frm ord re cross-mtns to vacate/modify/confirm arib entrd 7-5-89, 7-10-89 in cases 82-5184-HLH, * * * , 88-5759-HLH and 83-132-HLH. $105.00 Flng & Doc Fees Paid.

Case No. 88-5759

9/26/88	1.	Complt. Issd Summs.
		* * *
10/6/88	4.	ORD (LTL) (HLH) transfrng actn to cal of Judge HARRY L. HUPP for all fur procedgs. Case may be ref to Mag REICHMANN for discvry. cc ptys.
		* * *
11/14/88	6.	OSC re consolidation to CV-82-5184 HLH, in writing by 11/30/88 why the actns shld not be joined. No oral argument will be heard re this matter unless ord by the Crt.
11/15/88	7.	ANSWER TO THE COMPLT & THE TRUST'S COUNTERCLAIM AGNST CONCRETE PIPE & PRODUCTS CO. OF CALIF.
		* * *
12/9/88	11.	REPLY TO COUNTER-CLAIM OF CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIF.
		* * *
12/22/88	13.	ORD consolidating actns # 82-5184-HLH & CV-88-5759 HLH are consolidated for all purposes. All docs fld hereafter shall bear the names & #'s of both actns, w/ # CV-82-5184-HLH listed 1st.

* * *

5/5/89	15.	Memo of P/A in supprt of pltf motn for S/J & alter motn for partial S/J, pltf.
5/5/89	16.	Notc of motn & motn for S/J & alter motn for partial S/J, retbl 6/5/89, 1:30 PM. Pltf
5/5/89	17.	Statement of facts supprting motn for S/J. pltf
5/9/89	18.	Memo of P/A in opp to Concrete Pipe & Products Co.'s motn for S/J & alter motn for partial S/J. Pltf
5/23/89	19.	Memo of P/A in supprt of its motn to confirm, or modify & confirm, arbitrator's award. Pltf

* * *

6/5/89	21.	ORDER tht CPP mot is treated as petn to vacate arb awrd & is DENIED; mot of CLPT to confrm arb awrd is GRANTED; to extent tht mot to confirm seeks to "modify" award, it is treated as a mot to vacate & is DENIED; CLPT is to submit form of jgmnt (ENT 7/6/89) mld copies parties/ w/notc MD JS 6

8/4/89	Deft in CV-82-5184-HLH, Pltf in CV-83-132 HLH & Pltf/Petner in CV-88-5759-HLH, Fld Notc of Appl to 9th CCA frm ord re cross mtns to vacate/modify/confirm arib. entrd 7-5-89, 7-10-89 in cases 82-5184-HLH, * * * , 88-5759-HLH and 83-132-HLH. $105.00 Flng & Doc Fees Paid.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONSTRUCTION LABORERS' PENSION TRUST FOR SOUTHERN CALIFORNIA, Plaintiff, vs. CEN-VI-RO CONCRETE PIPE & PRODUCTS CO., INC., Defendant.	Case No. 82 5184 MMC (JRx) COMPLAINT FOR WITHDRAWAL LIABILITY (Filed Oct. 5, 1982)

Now comes the plaintiff Construction Laborers Pension Trust for Southern California ("CLPT") and, for a cause of action against defendant Cen-Vi-Ro Concrete Pipe & Products Co., Inc. ("Cen-Vi-Ro") alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to the provisions of section 4301 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. Section 1451.

2. Venue is laid in this district pursuant to the provisions of Section 4301(d) of ERISA, as amended, 29 U.S.C. Section 1451(d).

THE PARTIES

3. Plaintiff CLPT is an express Trust organized under and pursuant to the provisions of Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended. The CLPT is a Multi-Employer Benefit Plan within the meaning of Section 3(37) and 4001(a)(3) of ERISA, 29 U.S.C. Sections 1002 (37)(A) and 1301(a)(3), as amended by Sections 302(a) and 402(a)(1) of the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA").

4. Plaintiff is informed and believes, and upon that ground alleges, that Cen-Vi-Ro is a California corporation having a principal place of business in Lockeford, California.

CLAIM FOR RELIEF

5. Cen-Vi-Ro has been bound to collective bargaining agreements with the Laborers International Union of North America and affiliates thereof (the "Union"). The terms of said collective bargaining agreements required,

inter alia, Cen-Vi-Ro to make contributions to CLPT for each hour of covered employment worked or paid for.

6. Cen-Vi-Ro has contributed to the CLPT pursuant to these agreements. These contributions include contributions for work performed after April 28, 1980.

7. After April 28, 1980, Cen-Vi-Ro ceased to have an obligation to contribute to the CLPT, within the meaning of Sections 4203(a) and (b) of ERISA, as amended, 29 U.S.C. Sections 1383(a) and (b).

8. CLPT is informed and believes, and upon that ground alleges, that from and after November 1, 1981, Cen-Vi-Ro, following negotiations with the Union, declared that it was no longer obligated to contribute to the CLPT and continued to perform work within the jurisdiction of its previously-existing collective bargaining agreement with the Union, of the type for which contributions to the CLPT were previously required.

9. By virtue of the cessation of its obligation to contribute to the CLPT, defendant has effected a "complete withdrawal" from the CLPT within the meaning of Section 4203 of ERISA, as amended, 29 U.S.C. Section 1383.

10. At all times material hereto, CLPT was under an obligation, pursuant to the provisions of Section 4202 of ERISA, as amended, 29 U.S.C. Section 1382, to determine the amount of defendant's withdrawal liability, to notify defendant of the amount of their withdrawal liability, and to effect collection of the total liability amount due from the defendant.

11. Pursuant to the provisions of Section 4201(b) and 4211 of ERISA, as amended, 29 U.S.C. Sections 1381(b) and 1391, CLPT has made the required calculation of defendant's withdrawal liability, and has determined that Cen-Vi-Ro's withdrawal liability is a sum not less than Two Hundred Sixty-Eight Thousand, One Hundred Sixty-Eight Dollars, Eighty-One Cents ($268,168.81). The amount of said withdrawal liability assessments is subject to adjustment to a higher figure, in the event that the Pension Benefit Guaranty Corporation issues regulations authorizing the calculation of withdrawal liability in a greater amount.

12. On or about January 20, 1982, pursuant to its obligation under Section 4219(b)(1) of the MPPAA, 29 U.S.C. Section 1399(b)(1), CLPT notified Cen-Vi-Ro of the amount of its withdrawal liability and demanded payment thereof, in accordance with a prescribed schedule.

13. The aforesaid notification informed Cen-Vi-Ro that its withdrawal liability had been determined to be a sum not less than Two Hundred Sixty-Eight Thousand, One Hundred Sixty-Eight Dollars, Eighty-One Cents ($268,168.81); and further notified Cen-Vi-Ro that it could elect to pay the aforesaid sum, within sixty days, in a single payment, or, in the alternative, make monthly installment payments of Two Thousand, Eight Hundred Twenty-One Dollars, Eighty Cents ($2,821.80) for a period of 131 months and a final monthly payment of Two Thousand, Two Hundred Twenty-Six Dollars, Seventy-Four Cents ($2,226.74).

14. Thereafter, Cen-Vi-Ro failed, within sixty days following notification of the amount of its withdrawal

liability, to make any installment payment on its withdrawal liability or to make the alternative lump sum payment of its total withdrawal liability.

15. On or about August 12, 1982, the CLPT notified Cen-Vi-Ro that it had failed to make either a lump sum payment of its total withdrawal liability or the first required installment payment in satisfaction of its withdrawal liability. CLPT further notified Cen-Vi-Ro that if it failed to cure this delinquency within 60 days, Cen-Vi-Ro would be in default, and CLPT would demand payment of the entire amount of Cen-Vi-Ro's withdrawal liability, and would initiate suit to collect said sum, together with such additional sums as CLPT may be entitled to collect under the provisions of the MPPAA.

16. Cen-Vi-Ro has indicated to counsel for the CLPT that it will not make payment toward Cen-Vi-Ro's withdrawal liability to the CLPT. The CLPT is entitled pursuant to Section 4301(b) of ERISA, as amended; 29 U.S.C. Section 1451, to initiate suit to compel an employer to pay its withdrawal liability.

17. By virtue of Cen-Vi-Ro's failure as to its statutory obligation to pay the sums demanded by the CLPT, there is now due, owing and unpaid the delinquent monthly payments of Cen-Vi-Ro's withdrawal liability from March 22, 1982 to the date of the filing of this complaint, plus monthly payments which are not paid after the filing of this complaint, plus interest, liquidated damages, attorneys' fees and costs as allowed by Section 502(g)(2) of ERISA, as amended, 29 U.S.C. Section 1132(g)(2), together with such additional legal and equitable relief as the Court shall deem necessary to enforce Cen-Vi-Ro's payment obligation.

WHEREFORE, plaintiff prays:

A. That it have judgment against Cen-Vi-Ro for the delinquent monthly payments of Cen-Vi-Ro's withdrawal liability and a declaration that further monthly payments must be timely made pending resolution of the dispute between the parties as to the amount of liability owed the CLPT.

B. For interest on the aforesaid sums at the rate permitted by Section 502(g)(2) of ERISA, as amended;

C. For additional sums, equal to the greater of liquidated damages provided by the Pension Plan of the Construction Laborers Pension Trust for Southern California or interest on the aforesaid sums, in the amount specified by Section 502(g)(2) of ERISA, as amended;

D. For reasonable attorneys' fees;

E. For costs of suit;

F. For such other legal and equitable relief as to the Court shall seem [sic] necessary for the enforcement of defendant's payment obligation.

Dated: October 5, 1982

COX, CASTLE & NICHOLSON and
LAW OFFICES OF LIONEL RICHMAN

By /s/ Howard A. Kroll
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CONCRETE PIPE & PRODUCTS COMPANY OF CALIFORNIA, Plaintiff, -vs- THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant.	NO. F-82-389 EDP COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Filed Oct. 6, 1982)

1. Plaintiff, CONCRETE PIPE & PRODUCTS COMPANY OF CALIFORNIA, a California Corporation (hereinafter "CP & P) sues for declaratory and injunctive relief against the enforcement, prosecution or collection of

claims made by Defendant, THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA (hereinafter "TRUST") against CP & P, under the color of withdrawal liability provisions of the Multi-Employer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA") [29 U.S.C. § 1381, *et set.*], and pursuant to the procedures prescribed therein.

2. CP & P terminated its business in Shafter, California, stopped producing products on August 17, 1979, and commenced the removal of its machinery in September of 1979. The closure process lasted into October, 1979, at which point all of the employees at CP & P had been terminated. By this action, CP & P permanently ceased all covered operations under the TRUST and had thus accomplished a complete withdrawal from the TRUST as that term became defined upon the passage of MPPAA one year later, on September 26, 1980. [29 U.S.C. § 1381, *et. seq.* and 29 U.S.C. § 1382(b)(2)].

3. By letter dated August 12, 1982 (a copy of which is attached hereto as EXHIBIT "A"), the TRUST assessed CP & P withdrawal liability according to the TRUST's letter of January 20, 1982, asserting that liability in the sum of $268,168.81. (A copy of the January 20, 1982 letter is attached hereto as EXHIBIT "B"). The two letters demand that CP & P pay the aforesaid withdrawal liability in the single lump sum no later than October 12, 1981, or in the alternative, commence making monthly installment payments in the amount of $2,821.80 no later than October 12, 1982.

4. At the time of its plant closure and the termination of business, CP & P had paid to the TRUST

$102,656.68 representing all monies owed to the TRUST under its applicable collective bargaining agreements. CP & P's only other payment to the TRUST was in the sum of $48.60 paid to cover 40.5 hours worked by an employee hired in May 1980 to assist in shipping the last remaining production equipment from Shafter. The demand for and payment of another two and one-half times its contractual commitment is likely to make it onerous for CP & P to continue in business.

5. The TRUST has made the demand despite the fact that it is solvent and has at all times and continues to be able to make full payment of all benefits coming due to beneficiaries in a timely fashion.

6. CP & P seeks a declaration that it is not liable to the TRUST under the MPPAA for withdrawal liability in any amount because Plaintiff had ceased operations and withdrawn from the plan prior to the retroactive effective date of the plan and thus incurred no liability under the statute itself. CP & P further seeks declaration that it is not liable to the TRUST under the MPPAA for withdrawal liability in any amount because, on its face, and as retroactively applied to it, the statute deprives CP & P of its property without due process of law, takes its property for public use without just compensation, is vague, arbitrary, and capricious, lacks rational basis, abrogates the rights of access to the Courts and trial by jury, and is in violation of the Fifth and Seventh Amendments of the United States Constitution.

7. CP & P also seeks a temporary restraining order and preliminary injunction during the pendency of this action against collection of any withdrawal liability, the

declaration of default, and the expiration time in which to seek arbitration as well as a permanent injunction barring attempted enforcement of MPPAA.

JURISDICTION OF VENUE

8. This action arises under the Employee Retirement Income Security Act of 1974 (ERISA) [29 U.S.C. § 1001, *et. seq.*], as amended by the MPPAA, and arises out of the Fifth and Seventh Amendments of the United States Constitution. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331. Declaratory and related injunctive relief are authorized by 28 U.S.C. §§ 2001 and 2002.

9. Venue is laid in this Court pursuant to 28 U.S.C. § 1391(b).

THE PARTIES

10. CP & P is a corporation organized and existing under the laws of the State of California. Its principal place of business is in Sacramento, California. One of CP & P's plants, the one involved in the action herein, is located in Shafter, California. CP & P is a manufacturer of concrete pipe.

11. Defendant, TRUST, which is an unincorporated association with a principal place of business at 3540 Wilshire Boulevard, Suite 512, Los Angeles, California 90010, is sued as an entity pursuant to Section 502(d) of ERISA [29 U.S.C. § 1132(d)]. The TRUST is administered by U.S. Administrators, 3540 Wilshire Boulevard, Los Angeles, California 90010. The Trustees of Defendant

TRUST have designated U.S. Administrators as agent for service of legal process.

12. The TRUST exists pursuant to various collective bargaining agreements and related declarations of TRUST between the SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AFL-CIO, and their affiliated LOCAL UNIONS (hereinafter the "UNION"), and various multi-employer associations as well as independent employers such as CP & P.

13. The Declaration of Trust establishing the TRUST and Pension Plan, Article IV, §§ 4.07 and 4.08, provides as follows:

> "Section 4.07. Neither the Associations or any officer, agent, employee or committee member of the Associations shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he may incur liability as a Trustee as hereinafter provided. The liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the collective bargaining agreements with respect to his or its individual or joint venture operations, and in no event shall be or it be liable or responsible for any portion of the Contributions due from the Individual Employers with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operation of the Fund or of the Pension Plan,

> except as may be hereafter provided in the collective bargaining agreements.
>
> Section 4.08. Neither the Associations, any Individual Employer, the Union, any Local Union nor any Employee shall be able or responsible for any debts, liabilities or obligations of the Fund or the Trustees."

14. At all times relevant hereto, the trustees of the TRUST, the Administrators of the Pension Plan, the representatives of the multi-employer associations, and the Union have maintained and made public their position that the Pension Plan is a defined contribution plan as defined by ERISA, Section 3(34), and that it is not a defined benefit plan, as defined by Section 3(35) thereof.

THE BASIS FOR PLAINTIFF'S CLAIMS

15. On or about December 6, 1976, CP & P purchased from CEN-VI RO COMPANY, its assets, including its plant in Shafter, California. Prior to said purchase, the employees of CEN-RI VO [sic] were represented for the purposes of collective bargaining by the Union. Prior to the purchase CEN-VI RO had entered into a collective bargaining agreement requiring the payment of trust fund benefits for its employees.

16. After its purchase of the Shafter Plant, CP & P recognized the Union as the collective bargaining representative of its employees and began to abide by the collective bargaining agreement executed with CEN-VI RO CORPORATION. On November 27, 1978, CP & P renewed said agreement. The 1978 renewal like the previous agreement, required contributions to be made to

the TRUST on behalf of the employees. By the end of December, 1979, CP & P had contributed $102,656.68 to the TRUST on behalf of its employees.

17. On August 17, 1979, CP & P ceased production at its plant, sold its inventory and commenced the closure of the plant. By November of 1979, CP & P had removed a large majority of its machinery and production equipment and had shipped such machinery and production equipment to its facilities in Sacramento, California. All employees covered by the plan were terminated no later than the end of October, 1979. No employees covered under the TRUST were re-employed until May of 1980.

18. In May of 1980, CP & P was to ship its last piece of machinery from the Shafter Plant to its Sacramento facilities. To assist in the loading of the truck, it hired one of the employees covered by the terms of the TRUST who worked for 40.5 hours. For his work in May, 1980, CP & P contributed $48.60 to the TRUST by payment in June of 1980. At the conclusion of May, 1980, all machinery at the plant was totally dismantled and removed from the premises.

19. At the time CP & P ceased doing business at its Shafter Plant and thus ceased participation in the TRUST, it was not liable under the terms of the TRUST agreement to make any further contributions to the TRUST with respect to the Pension Plan, and CP & P's liability for any portion of the contributions due from other individual employers or for the debts, liabilities or obligations of the TRUST was expressly, specifically and unequivocally disclaimed by Article IV, §§ 4.07 and 4.08 of the Declaration of Trust. At the time of the plant closure there were no

plans to reopen it. It was not until two years after the plant's closure that CP & P reopened the plant.

20. Nevertheless, the TRUST had asserted a claim against CP & P in the amount of $268,168.81, an amount which exceeds payments required under CP & P's collective bargaining agreements by a factor of over two and one-half times. Said claim is totally in excess of any amounts that were required of Plaintiff under the terms of its collective bargaining agreements or under the Declaration of Trust itself. The TRUST relies, as a sole basis for its claim, on the provisions of the MPPAA that purport to impose on employers withdrawing on or after April 29, 1980, a time prior to the enactment of the MPPAA, a previously non-existent liability for the alleged unfunded vested liability of the pension plan, which liability the MPPAA requires the TRUST to ascertain, to assert and enforce.

21. The TRUST has demanded that Plaintiff pay the entire $268,168.81 immediately or commence making monthly installments in the amount of $2,821.80 by October 12, 1982.

22. It makes this demand despite the fact that it has refused to respond to the request propounded under MPPAA for information on the Trust's calculations of unfunded vested liability. If CP & P complied with the monthly demand, which includes interest charges unauthorized by the statute, CP & P would actually be required to pay $374,704.34 in fulfillment of the purported obligation at an annual rate of $33,861.60.

23. The $268,168.81 claimed represents a portion of all the alleged unfunded vested benefits of TRUST, arbitrarily allocated to Plaintiff without regard to the cause of, or any relationship of Plaintiff to, any part of any such unfunded benefits, and without regard to the existence, or absence of any past employer-employee relationship between Plaintiff and any participant in, or beneficiary of, the pension plan. The withdrawal liability claim greatly exceeds Plaintiff's total contributions to the TRUST prior to its termination of its business and, by definition, withdrawal from participation in the TRUST's Pension Plan.

UNDER THE TERMS OF THE MPPAA, CP & P IS NOT SUBJECT TO WITHDRAWAL LIABILITIES

24. Section 4201(b)(2) and 4203(a) of the MPPAA [U.S.C. §§ 1380 and 1382] provide that a complete withdrawal under the terms of the Act occur when an employer permanently ceases all covered operations under the plan. Under the definition, CP & P accomplished a complete withdrawal in August, 1979, over seven months prior to the retroactive date of MPPAA and over one year prior to the passage of MPPAA. It is the position of CP & P that under the terms of MPPAA no liability can be assessed against it since it effecutated [sic] a complete withdrawal prior to the retroactive effective date of MPPAA. It is the position of the TRUST that CP & P's cessation of all covered activity did not constitute a withdrawal and thus it became subject to MPPAA. For this reason, a dispute as to the interpretation of MPPAA exists between the parties and CP & P is entitled to a declaration by this Court that it is not covered under

MPPAA and thus has no withdrawal liability, no duty to arbitrate and is entitled to attorney's fees.

THE INFRINGEMENT OF PLAINTIFF'S CONSTITUTIONAL RIGHTS

25. Section 4219 and 4221(d) of the MPPAA [29 U.S.C. § 1399, 1401(d)], requires any employer who contests either the existence, the amount, or payment schedule or the withdrawal liability claimed, to nevertheless commence payment of the purported obligation as demanded before the employer has had an opportunity to contest its validity. Moreover, the MPPAA affords the employer no procedural protection whatsoever against the risk of an erroneous deprivation of its property rights prior to a hearing on its exceptions to the withdrawal liability claim. The ex parte determinations made by the TRUST, regarding the existence and amount of withdrawal liability, are not subject to the scrutiny of any disinterested third party prior to payment being required. No bond is required to secure the return of any payments made by the employer, and no interest is paid thereon, if the employer successfully contests the existence or amount of the withdrawal liability claimed at a post-payment hearing. In fact there exists no provision for repayment to the employer of overpayments. For each and all of the foregoing reasons, §§ 4219 and 4221(d) of the MPPAA deprive Plaintiff of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

26. Section 4221 of the MPPAA [29 U.S.C. Section 1401] compels an employer who disputes either the

existence or amount of the claimed withdrawal liability to arbitrate the dispute rather than contest its validity in a court of law wherein the facts upon which the existence and amount of the withdrawal liability depends may be determined by a jury. Moreover, § 4221 precludes the assertion of constitutional defenses in the course of the arbitration proceeding and give the withdrawal liability determinations of the TRUST a presumption of correctness that has no rational basis in fact, thereby delegating to a private party having a self-interest in the outcome the power to make presumptively valid and potentially conclusive determinations of law and fact effecting the existence and amount of the withdrawal liability due. For each and all of the foregoing reasons, Section 4221 of the MPPAA deprives CP & P of its constitutional right of access to the courts and due process of law guaranteed by the Fifth Amendment, and to a jury determination of contested issues of fact guaranteed by the Seventh Amendment to the Constitution of the United States.

27. Section 3201(a) of the MPPAA [29 U.S.C. § 1381(a)] imposes liability on an employer who effects a complete withdrawal from a multi-employee [sic] pension fund. Retroactively applied to a withdrawal occurring prior to enactment if [sic] the MPPAA into law, it impairs and abrogates preexisting contractual rights and statutory limitations of liability upon which CP & P was entitled to rely in assessing its potential exposure to the TRUST on termination of its business. As retroactively applied to an event occurring prior to its enactment into law, the MPPAA failed to give CP & P fair warning of an opportunity to avoid withdrawal liability by altering its behavior. Moreover, the wholly retroactive withdrawal

liability imposed in a confiscatory amount is determined and measured by factors that are wholly outside the control of CP & P, and are largely unrelated to any act, omission or fault of CP & P, or to any employer-employee relationship in which CP & P was involved at any time. For each and all of the foregoing reasons, § 4201(a) of the MPPAA, as retroactively applied to CP & P, deprives CP & P of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

28. Section 4201(a) of the MPPAA, as retroactively applied to a withdrawal occurring prior to enactment of the MPPAA into law, impairs and abrogates contractual rights without affording any compensation whatsoever for its loss. Moreover, the wholly retroactive withdrawal liability which the TRUST seeks to impose on the basis of § 4201(a) greatly dilutes the aggregate net worth of CP & P. If required to pay the retroactively imposed withdrawal liability claimed by the TRUST under § 4201(a), CP & P's assets will be seriously dissipated. Notwithstanding the debilitating impact on CP & P of the withdrawal liability which the TRUST seeks to impose on CP & P under the MPPAA, no compensation whatsoever will be paid to CP& P. For each and all of the foregoing reasons, § 4201(a) of the MPPAA, as the TRUST seeks retroactively to apply it to CP & P, would effect a taking of CP & P's property for public use without affording just compensation in violation of the Fifth Amendment to the Constitution of the United States.

29. Section 4201(a) of the MPPAA, both on its face and as retroactively applied to a "complete withdrawal"

as defined in § 4203, [29 U.S.C. § 1383], affords no intelligible basis upon which liability can be ascertained or measured. Because of the ambiguity and vagueness of the terms used to determine the existence and the amount of the imposed withdrawal liability, of ordinary imposed men of ordinary intelligence necessarily must guess as to the meaning, and differ as to the application, of the statutory language upon which the existence and the amount of withdrawal liability depends. The MPPAA fails to give fair warning of the conduct for which, and the circumstances in which, withdrawal liability will be imposed, and its provisions for measuring the amount of liability to be imposed are so standardless that they are incapable of rational, consistent and fair application. For each and all of the foregoing reasons, the MPPAA deprives CP & P of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

30. The TRUST is a Taft-Harltey [sic] Trust Fund. As provided 29 U.S.C. § 186, the TRUST is composed of an equal number of union and management trustees, each ostensibly safeguarding the rights of its respective constituencies. Upon passage of ERISA in 1974, the obligation of the Trustees became clouded by an apparent conflicting obligation to pension plan beneficiaries. Indeed, recent Supreme Court pronouncements hold that the trustees are fiduciaries obligated to protecting the plan beneficiaries only. The confusion caused by these conflicting Congressional enactments had left all parties unsure of their rights and obligations. The MPPAA does not take account of this confusion, which made it impossible for CP & P to take defensive measure to lessen any

unfunded liability to the TRUST. The MPPAA gives carte blanche authority to parties over whom CP & P has no control to seize CP & P's assets on demand in satisfaction of a liability CP & P had no hand in creating. For each of the foregoing reasons, the MPPAA deprives CP & P of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

31. ERISA provides that Pension Plans are either "defined benefit" plans or "defined contribution" plans. The MPPAA arbitrarily assumes that multi-employee pension plans in the construction industry, like the instant pension plan, are necessarily defined benefit pension plans which promise a certain benefit level to beneficiaries. The instant Pension Plan expressly disclaims any promise of a particular level of benefits, and beneficiaries are all well aware of this. Thus, although Congress may have had the authority to declare that pension plans are a defined benefit plan for such limited purposes as having the Pension Benefit Guarantee Corporation (PBGC) assess such plans a nominal premium in order to finance insurance protection for the vested benefits of pension plan beneficiaries, it is patently irrational and arbitrary for Congress to provide in the MPPAA that multi-employer pension plans are necessarily defined benefit plans for purposes of withdrawal liability. For each and all of the foregoing reasons, the MPPAA deprives CP & P of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

32. The MPPAA is arbitrary and capricious in holding employers, like CP & P, responsible for the unfunded

liability of pension plans. Employers, like CP & P, have no control over the administration of multi-employer pension plans, the setting of benefit levels, investment decisions, etc. To the extent that there is a likelihood that CP & P's withdrawal creates any possibility that "promised" benefits will not be adequately funded, the MPPAA arbitrarily and capriciously holds only employers like CP & P responsible. The MPPAA thereby discriminates against such employers inasmuch as such employers are the least responsible for any unfunded vested liability of the TRUST. Rather, the cause of the problem lies primarily with the beneficiaries themselves, who by demanding and receiving higher wage rates, have made union labor increasingly uncompetitive, and with the Trustees over whom employers, like CP & P, have no control whatsoever and who have set excessively high target benefit levels without providing for a corresponding increase in contribution revenue sufficient to satisfy vested benefits for plan beneficiaries.

33. The TRUST's demand for withdrawal liability payments by CP & P in reliance on MPPAA has seriously and adversely affected CP & P's credit. Compliance with the TRUST's demand would severely jeopardize the solvency and survival of, if not bankrupt CP & P, irreparably injuring CP & P in violation of its above-described constitutional rights.

34. CP & P has no plain, adequate or speedy remedy at law, and this suit for declaratory and injunctive relief as only means for securing relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

A. Assume jurisdiction of this action;

B. Enjoin, *pendente lite*, the TRUST and its Trustees, agents, employees, attorneys, representatives, and/or successors from taking any action whatsoever prescribed by §§4219 and 4221 of the MPPAA [29 U.S.C. §§1399 and 1401] to prosecute, enforce, or collect its withdrawal liability claim or to penalize CP & P for non-compliance with the TRUST's demand for payment thereof and tolling the time to demand arbitration;

C. Enter a declaratory judgment that:

(1) That CP & P ceased all covered operations before the retroactive effective date of MPPAA and thus completely withdrew from the TRUST as that term was later defined in MPPAA so that CP & P is not covered by MPPAA and thus has no withdrawal liability and no duty to arbitrate.

(2) Section 4219 of the MPPAA, 29 U.S.C. §1399, is unconstitutional and void insofar as it infringes the right to due process of law guaranteed by the Fifth Amendment, as alleged in the Complaint herein;

(3) Section 4221 of the MPPAA, [29 U.S.C. §1401], is unconstitutional and void insofar as it infringes the rights to access to the courts and due process of law guaranteed by the Fifth Amendment, and the right to a jury trial guaranteed by the Seventh Amendment, as alleged in the Complaint herein;

(4) Section 4201(a) of the MPPAA, [29 U.S.C. §1381(a)], is unconstitutional and void insofar as it infringes the right to due process of law guaranteed by the Fifth Amendment, as alleged in the Complaint herein;

(5) Section 4201(a) of the MPPAA, [29 U.S.C. §1381(a)], is unconstitutional and void insofar as it infringes the right to due process of law guaranteed by the Fifth Amendment, alleged in the Complaint herein;

D. Grant CP & P its costs and disbursements herein;

E. Grant CP & P attorney's fees under §§ 29 U.S.C. 1451(a)(1) and § 1451(e); and

F. Grant CP & P such other and further relief as the Court may deem appropriate.

DATED: October 5, 1982

DIEPENBROCK, WULFF,
PLANT & HANNEGAN

BY: /s/ Dennis R. Murphy
DENNIS R. MURPHY
Attorneys for Plaintiff,
CONCRETE PIPE
& PRODUCTS CO.

STATE OF CALIFORNIA)
)
U.S. DISTRICT COURT) SS
EASTERN DISTRICT)
COUNTY OF SACRAMENTO)

VERIFICATION

WILLIAM A. STREET, III, being duly sworn, deposes and says:

1. He is the Executive Vice President of CONCRETE PIPE PRODUCTS COMPANY OF CALIFORNIA, Plaintiff herein.

2. He has knowledge of the facts pleaded in the foregoing COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, and that, under penalty of perjury, he declares those facts to be true and correct to the best of his information and belief.

Executed this 6th day of October, 1982 at Sacramento, California.

/s/ William A. Street
WILLIAM A. STREET, III

SUBSCRIBED AND SWORN TO
before me this 6th day of October, 1982.

/s/ Alice Hillbun [SEAL]
ALICE HILLBUN
Notary Public

Alice D. Hillbun

EXHIBIT A

COLLECTION OFFICE

THE CONSTRUCTION LABORERS' PENSION TRUST

FOR SOUTHERN CALIFORNIA

3540 Wilshire Boulevard, Suite 512 •
Los Angeles, California 90010

Telephone (213) 383-3151

August 12, 1982 (logo)

Dennis R. Murphy, Esq.
Diepenbrock, Wulff, Plant & Hannegan
455 Capitol Mall
Sacramento, California 95814

Re: Cen-Vi-Ro Concrete Pipe Products Co., Inc.
Account #98973

Dear Mr. Murphy:

In accordance with my letter of July 9, 1982, please be advised that, after review of the above case, the Trusts' co-counsel have recommended that the withdrawal liability billing of January 20, 1982 be pursued.

In light of this determination, we have sent this day, a notice of delinquent payment to Cen-Vi-Ro, a copy of which is enclosed for your information.

We previously discussed the effect that a delay in the Trusts' response to these matters would have on the time limits with respect to arbitration. Mr. Sumner's letter requesting arbitration was received on March 12, 1982, and your letter of May 13, 1982 requesting a "hold" on the time remaining under the statute resulted in 62 days

having expired. The time will start running again on the date you receive this letter.

Should you have any further questions, please contact this office.

Very truly yours,

/s/ Dan O'Connell
DAN O'CONNELL
Collection Office

DO:am

cc: Cen-Vi-Ro
Lionel Richman, Esq.
John S. Miller, Jr., Esq.

EXHIBIT B

COLLECTION OFFICE

THE CONSTRUCTION LABORERS' PENSION TRUST

FOR SOUTHERN CALIFORNIA

3540 Wilshire Boulevard, Suite 512 •
Los Angeles, California 90010

Telephone (213) 383-3151

January 20, 1982 (logo)

CEN-VI-RO Concrete Pipe Products Co., Inc.
P. O. Box 103
Lockeford, California 95237

Gentlemen:

Our records indicate that you have not contributed to the Construction Laborers Pension Trust Fund ("Plan") since February 1981. We are further advised that you have not signed a renewal of a collective bargaining agreement obligating you to continue contributions to the Plan on behalf of the Construction laborers currently in your employ.

Based on this information, we conclude that you have chosen to withdraw from the Plan. Accordingly, you are subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, a federal enactment amending the Employee Retirement Income Security Act of 1974 ("ERISA").

This statute, as you probably know, provides that when an employer withdraws from participation in a multiemployer pension plan, the withdrawing employer is obligated to the Plan for a portion of the Plan's unfunded vested benefit liabilities as of the end of the Plan year immediately preceding the date of the employer's withdrawal.

Pursuant to the provisions of this 1980 statute and to the implementing regulations promulgated by the Pension Benefit Guaranty Corporation, the Board of Trustees of the Plan have adopted certain methods of calculating the withdrawal liabilities applicable to you. These calculations are summarized on the attached form. They indicate that your withdrawal liability amounts to $268,168.81.

If, as anticipated by the Plan, the Pension Benefit Guaranty Corporation issues regulations on the assumptions

which may be used to calculate withdrawal liability and these assumptions authorize the Plan to assess a withdrawal liability amount which is greater than that set forth in the preceding sentence, then the Plan will deem the withdrawal liability owed by you to be the greater amount.

You may pay the withdrawal liability set forth in the preceding paragraph in a single lump sum payable within 60 days after your receipt of this letter.

Should you decline to so pay, ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980, provides a method for calculating periodic installment payments by which you may satisfy your withdrawal liability arising under the statute. Using this method, we have determined that your withdrawal liability may be satisfied by 132 monthly payments in the amount of $2,821.80, and a final monthly payment of $2,226.74.

You are expressly obligated under Federal Law to commence your monthly payments on March 22, 1982.

Thereafter, your monthly payments are due on the same date of each succeeding month.

The number of months over which your payments are due will increase correspondingly with any withdrawal liability increase resulting from issuance of the Pension Benefits Guaranty Corporation regulations mentioned above. Additionally, the amount of your final and other monthly payments may vary as a result of future regulations; and your obligation may be subject to such additional steps as the Board of Trustees may require in accordance with the law.

Should you fail to make your first monthly payment by its due date, or should you fail to make any subsequent monthly payments when due, ERISA, as amended, provides that you will incur interest charges from the date your payment becomes due until the date payment is finally received. Additionally, you may incur liability for liquidated damages and other sums assessed under the delinquency provisions of the Plans' Trust Agreement. The rate of interest at which you will be assessed is that rate equal to the per annum rate of interest established by the Federal Reserve Board of San Francisco on advances to member banks under Sections 13 and 13(a) of the Federal Reserve Act prevailing on the 25th day of the month preceding the date on which your payment became due plus five (5) percent. This rate of interest is subject to change if the Pension Benefit Guaranty Corporation issues regulations providing a different rate of interest.

More importantly, should you fail to pay any monthly payment plus interest within 60 days after receiving written notice from the Plan that such payment is delinquent, or should you commit any other act which the Plan has deemed to constitute a "default" in your payment obligations, ERISA, as amended, provides that the Board of Trustees may deem you to be in default and thereby liable for immediate payment of the outstanding amount of your withdrawal liability plus accrued interest on your total outstanding liability from the due date of the first payment which was not timely made.

This letter is intended to provide you with notice of your liability and payment obligations and of the existence of ERISA, as amended, and of some of its provisions. This

letter is not intended as an explanation of the statute, nor shall it be construed as limiting in any way the rights of the Plan under the statute.

Very truly yours,

/s/ Dan O'Connell
DAN O'CONNELL
Auditor

DO:am

cc: Southern California District Council of Laborers

CERTIFIED MAIL – RETURN RECEIPT

Cen-Vi-Ro Concrete
Pipe & Prod. Co., Inc.
JAN 25 1982
RECEIVED
LOCKEFORD

WORKSHEET FOR ESTIMATING WITHDRAWAL LIABILITY FROM THE SOUTHERN CALIFORNIA LABORERS PENSION TRUST DURING YEAR ENDED DECEMBER 31, 1981

1. What were your company's contributions to the Pension Fund during the five years ending:

   a. December 31, 1979 $ 146,699.67

   b. December 31, 1980 $ 118,520.96

2. The aggregate Pension Fund contributions on behalf of continuing employers during these five years were as follows:

   a. December 31, 1979 $ 273,549,700

   b. December 31, 1980 $ 320,467,000

3. Percent of total Pension Fund contributions for which you were obligated:

   a. Divide 1a by 2a .000536282

   b. Divide 1b by 2b .000369838

4. The Pension Fund's aggregate unfunded vested liability pools as of December 31, 1980 are as follows:

   a. Pool as of December 31, 1979 $ 468,656,500

   b. Pool as of December 31, 1980 $ 45,524,700

5. Your estimated withdrawal assessment before the offset is determined as follows:

   a. Line 3a multiplied by line 4a $ 251,332.05

   b. Line 3b multiplied by line 4b $ 16,836.76

   c. Total of a and b $ 268,168.81

6. Offset amount: $ -0-

   - If line 5c is less than $100,000, then the offset amount equals $50,000.
   - If line 5c is greater than $150,000, then the offset amount equals $0.
   - If line 5c exceeds $100,000 but is less than $150,000, then the offset amount equals $50,000 minus the amount by which line 5c exceeds $100,000; for example, if line 5c equals $130,000, then the offset amount equals $20,000.

7. Your estimated withdrawal assessment equals line 5c less line 6: $ 268,168.81

(Certificate Of Service Omitted In Printing)

JAMES P. WATSON
COX, CASTLE & NICHOLSON
2049 Century Park East, 28th Floor
Los Angeles, California 90067
(213) 277-4222

LAW OFFICES OF LIONEL RICHMAN
1625 W. Olympic Boulevard, Suite 810
Los Angeles, California 90015
(213) 388-5632
Attorneys for Defendants

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CONCRETE PIPE & PRODUCTS COMPANY OF CALIFORNIA, Plaintiff, v. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant.	)	No. Civ F 82-389-EDP ANSWER TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND COUNTERCLAIM. (Filed Dec. 27, 1982)

Now comes the defendant, Construction Laborers Pension Trust for Southern California ("CLPT") and answering for itself and for no other party, admits, denies and alleges as follows:

1. Answering paragraph 1, admits that the contents thereof accurately describe the claim made by plaintiff in this action.

2. Answering paragraph 2, denies the allegations of said paragraph 2, except that defendant admits that plaintiff partially curtailed its business operations for some period of time prior to the passage of the MPPAA.

3. Answering paragraph 3, admits the allegations of said paragraph 3.

4. Answering paragraph 4, admits that the payments alleged therein were made to the CLPT; generally denies the remaining allegations of said paragraph 4.

5. Answering paragraph 5, admits that the CLPT is currently able to pay vested benefits as they become due; generally denies that the remaining allegations of paragraph 5 accurately describe the financial condition of the CLPT.

6. Answering paragraph 6, admits that the allegations thereof accurately describe the claims being made by the plaintiff in this action; affirmatively alleges that each of said claims lack merit.

7. Answering paragraph 7, admits that plaintiff seeks the relief described in said paragraph; denies that plaintiff is legally entitled to such relief.

8. Answering paragraph 8, admits that plaintiff purports to invoke jurisdiction on the grounds set forth therein.

9. Answering paragraph 9, admits that plaintiff purports to lay venue on the grounds set forth therein.

10. Answering paragraph 10, states that it is without information or belief sufficient to enable it to answer the allegations contained therein, and placing its denial

upon that ground, generally denies the allegations of paragraph 10, except that defendant admits that plaintiff has an ownership interest in a plant located in Shafter, California.

11. Answering paragraph 11, admits that the defendant CLPT is an express trust, and that plaintiff seeks to bring suit against it pursuant to the provisions of 29 U.S.C. §1132(d); denies, generally and specifically, the remaining allegations of said paragraph 11.

12. Answering paragraph 12, denies that the allegations thereof are an accurate description of the documentation relating to the creation and administration of the CLPT; affirmatively alleges that the CLPT exists pursuant to the provisions of a written Declaration of Trust entered into in 1962 between parties not named in this action.

13. Answering paragraph 13, admits the allegations thereof.

14. Answering paragraph 14, denies that the allegations thereof are a full and accurate statement of the position taken by the persons mentioned therein; admits that, prior to the decision of the Ninth Circuit Court of Appeals in *Connolly v. Pension Benefit Guaranty Corporation*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979), certain persons took the position that benefit plans of the type operated by the CLPT were defined contribution plans.

15. Answering paragraph 15, states that it is without information or belief sufficient to enable it to answer the allegations thereof regarding the purchase of the

assets of Cen-Vi-Ro Company; admits the remaining allegations thereof.

16. Answering paragraph 16, admits the allegations thereof.

17. Answering paragraph 17, states that it is without information or belief sufficient to enable it to answer the allegations contained therein, and placing its denial upon that ground, denies the allegations thereof.

18. Answering paragraph 18, admits that the records of plaintiff indicate the employment of at least one individual during May, 1980; states that it is without information or belief sufficient to enable it to answer the remaining allegations of said paragraph, and placing its denial upon that ground, denies each and all of said allegations.

19. Answering paragraph 19, states that it is without information or belief sufficient to enable it to answer the allegations contained therein regarding the closure of plaintiff's business in Shafter, California and the subsequent reopening of said business, and placing its denial upon that ground, denies said allegations; denies that the portions of paragraph 19 purporting to describe plaintiff's obligations with respect to the CLPT are a full and accurate statement thereof; refers to the Trust Agreement and the Collective Bargaining Agreement to which plaintiff was bound for a full and accurate statement of their terms.

20. Answering paragraph 20, admits that the CLPT has assessed a withdrawal liability against plaintiff in the sum of $268,168.81; admits that the CLPT has assessed

such withdrawal liability pursuant to the provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"); admits that the CLPT is obligated to assess such liability pursuant to the provisions of the MPPAA; denies the remaining allegations of paragraph 20 on the ground that said allegations are unintelligible.

21. Answering paragraph 21, admits the allegations of said paragraph 21.

22. Answering paragraph 22, denies that defendant has refused to furnish any information which it is obligated to supply pursuant to the provisions of the MPPAA; admits the remaining allegations thereof.

23. Answering paragraph 23, admits that the withdrawal liability assessed against plaintiff represents a portion of the calculated unfunded vested liability of the CLPT; denies that said withdrawal liability was arbitrarily allocated to plaintiff, admits that said withdrawal liability assessment is in excess of plaintiff's total prior contributions to the CLPT with respect to its operation in Shafter, California; denies the remaining allegations of paragraph 23.

24. Answering paragraph 24, denies that said paragraph furnishes a full and accurate statement of the circumstances under which "withdrawal" occurs within the meaning of the MPPAA; refers to the terms of the MPPAA for a full and accurate statement of the provisions thereof; denies that plaintiff completely withdrew from the CLPT in August, 1979; denies that paragraph 24 accurately expresses the legal position of the CLPT with respect to plaintiff's withdrawal liability; admits that a dispute exists between plaintiff and the CLPT; denies,

generally and specifically, the remaining allegations of paragraph 24.

25. Answering paragraph 25, denies that said paragraph fully and accurately states the provisions of the statutes referred to therein; denies, generally and specifically, the remaining allegations of said paragraph 25.

26. Answering paragraph 26, denies that the allegations thereof contain a full and accurate statement of the statutory provisions referred to therein; refers to the text of the MPPAA for a full and accurate statement of its terms; specifically denies that the MPPAA deprives plaintiff of constitutional rights guaranteed by the Fifth Amendment and the Seventh Amendment to the U.S. Constitution.

27. Answering paragraph 27, denies that the allegations thereof contain a full and accurate statement of the statutory provisions quoted therein; denies, generally and specifically, each and every, all and singular, the remaining allegations of paragraph 27.

28. Answering paragraph 28, denies that the allegations thereof contain a full and accurate statement of the statutory provisions referred to therein; denies, generally and specifically, each and every, all and singular, the remaining allegations of said paragraph 28, except that defendant admits that the CLPT has assessed a withdrawal liability against plaintiff.

29. Answering paragraph 29, denies, generally and specifically, each and every, all and singular, the allegations of said paragraph 29.

30. Answering paragraph 30, denies that the allegations thereof correctly describe the duties of the Trustees of the CLPT; denies that the description of the Employee Retirement Income Security Act of 1974 contained therein is accurate; denies, generally and specifically, the remaining allegations of said paragraph 30.

31. Answering paragraph 31, denies that the allegations thereof correctly describe applicable provisions of federal law, of the CLPT's Pension Plan, or of the expectations of beneficiaries thereof; denies, generally and specifically, the remaining allegations of said paragraph 31.

32. Answering paragraph 32, denies, generally and specifically, each and every, all and singular, the allegations of said paragraph 32.

33. Answering paragraph 33, states that is without information or belief sufficient to enable it to answer the allegations contained therein, and placing its denial upon that ground, denies, generally and specifically, the allegations of paragraph 33.

34. Answering paragraph 34, denies, generally and specifically, each and every, all and singular, the allegations of paragraph 34.

FIRST AFFIRMATIVE DEFENSE

35. And for a first, separate and distinct affirmative defense, this answering defendant alleges that the Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

36. And for a second, separate and distinct affirmative defense, this answering defendant alleges that plaintiff has failed to exhaust the administrative remedies provided by §4221 of ERISA as amended by the MPPAA, and is precluded from raising any issue herein which might have been resolved through the arbitration procedure set forth in said statute.

THIRD AFFIRMATIVE DEFENSE

37. And for a third, separate and distinct affirmative defense, this answering defendant alleges that plaintiff is precluded from obtaining injunctive relief because of plaintiff's laches.

FOURTH AFFIRMATIVE DEFENSE

38. And for a fourth, separate and distinct affirmative defense, this answering defendant alleges that plaintiff is not entitled to injunctive or other equitable relief because of plaintiff's unclean hands.

COUNTERCLAIM

Now comes the defendant and counter-claimant, Construction Laborers Pension Trust for Southern California ("CLPT"), and, for a cause of action against plaintiff and counter-defendant, Concrete Pipe & Products Company of California ("CPPC"), alleges as follows:

1. This is a mandatory counterclaim, brought pursuant to the provisions of Rule 13(a) of the Federal Rules

of Civil Procedure. This Court has independent jurisdiction of the subject matter of this counterclaim, pursuant to the provisions of §4221(b)(1) of ERISA, as amended by the MPPAA, 29 U.S.C. §1401(b)(1) and pursuant to the provisions of 28 U.S.C. §1331(a) and 28 U.S.C. §1337(a).

2. Counterclaimant CLPT is, and at all times material hereto was, an express trust organized under and pursuant to the provisions of §302(c)(5) of the Labor Management Relations Act of 1947, as amended. Counterclaimant is a multiemployer benefit plan within the meaning of §§3(37)(A) and 4001(a)(3) of ERISA, 29 U.S.C. §1002(37)(A) and 1301(a)(3), as amended by §§302(a) and 402(a)(1) of the MPPAA. Counterclaimant has standing to bring this counterclaim pursuant to the provisions of §502(d)(1) of ERISA, 29 U.S.C. §1132(d)(1).

3. Counterclaimant is informed and believes, and upon that ground alleges, that at all times material hereto, counterdefendant CPPC was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, and that counterclaimant is doing business within the Central District of California.

4. On and prior to July 1, 1980, counterdefendant CPPC was bound to a written Collective Bargaining Agreement which, by its terms, obligated CPPC to make contributions to the counterclaimant CLPT for each hour of work performed by covered laborers.

5. Substantially all the employees with respect to which CPPC had an obligation to contribute to the CLPT were performing work in the building and construction industry, within the meaning of §4203(b)(1)(A) of ERISA, as amended by the MPPAA, 29 U.S.C. §1383(b)(1)(A).

6. On or about November 20, 1981, counterdefendant CPPC permanently ceased to have an obligation to contribute to the CLPT, within the meaning of §4203(b)(2)(A) of ERISA, as amended by the MPPAA, 29 U.S.C. §1383(b)(2)(A).

7. Counterclaimant is informed and believes, and upon that ground alleges, that from and after November 20, 1981, counterdefendant CPPC continued to perform work within the jurisdiction of its previously existing Collective Bargaining Agreement, of the type for which contributions to the CLPT were previously required.

8. The CLPT is an employee benefit plan which primarily covers employees in the building and construction industry, within the meaning of §4203(b)(1)(B)(i) of ERISA, as amended by the MPPAA, 29 U.S.C. §1382(b)(1)(B)(i).

9. By virtue of the cessation of its obligation to contribute to the CLPT, counterdefendant CPPC has effected a "complete withdrawal" from the CLPT within the meaning of §4203 of ERISA, as amended by the MPPAA, 29 U.S.C. §1383.

10. At all times material hereto, the CLPT was under an obligation, pursuant to the provisions of §4202 of ERISA, as amended by the MPPAA, 29 U.S.C. §1382, to determine the amount of CPPC's withdrawal liability, to notify CPPC of the amount of its withdrawal liability, and to effect collection of the total withdrawal liability amount due from the employer.

11. Pursuant to the provisions of §4201(b) and 4211 of ERISA, as amended by the MPPAA, 29 U.S.C.

§§1381(b) and 1391, CLPT has made the required calculation of CPPC's withdrawal liability, and has determined that CPPC's withdrawal liability is a sum not less than $268,168.81.

12. On or about January 20, 1982, pursuant to its obligations under §4219(b)(1) of ERISA, as amended by the MPPAA, 29 U.S.C. §1399(b)(1), the CLPT notified CPPC of the amount of its withdrawal liability and demanded payment thereof, in accordance with a prescribed schedule. A true and correct copy of said notification is attached hereto as Exhibit A.

13. The aforesaid notification informed CPPC that its withdrawal liability had been determined to be a sum not less than $268,168.81, and further notified CPPC that it could elect to pay the aforesaid sum, within 60 days, in a single payment, or in the alternative, make monthly installment payments for a period of 132 months.

14. Following notification by the CLPT, CPPC failed, within 60 days after receipt of notification of the amount of its withdrawal liability, to make any installment payment on its withdrawal liability, or to make the alternative lump sum payment of its total withdrawal liability.

15. On or about August 12, 1982, the CLPT notified CPPC that it had failed to make either a lump sum payment of its total withdrawal liability or the first required installment payment in satisfaction of its withdrawal liability. The CLPT further notified CPPC that if it failed to cure this delinquency within 60 days, CPPC would be in default, and the CLPT would demand payment of the entire amount of CPPC's withdrawal liability,

and would initiate suit to collect said sum, together with such additional sums as the CLPT may be entitled to collect under the provisions of ERISA, as amended by the MPPAA.

16. Within 60 days after notification by the CLPT of its delinquent status, CPPC failed to make any payment whatsoever in satisfaction of its withdrawal liability to the CLPT.

17. By virtue of CPPC's default, the CLPT may, and does hereby, pursuant to the provisions of §4219(c)(5) of ERISA, as amended by the MPPAA, 29 U.S.C. §1399(c)(5), declare the entire amount of CPPC's withdrawal liability due and payable, as of the due date of the first payment not timely made.

18. By virtue of CPPC's default as to its statutory obligation to pay the sums demanded by the CLPT, there is now due, owing and unpaid to the CLPT the sum of $268,168.81, plus interest, liquidated damages, attorneys' fees and costs as allowed by §502(g)(2) of ERISA, as amended, 29 U.S.C. §1132(g)(2), together with such additional legal and equitable relief as the Court shall deem necessary to enforce CPPC's payment obligation.

19. CPPC has failed to invoke and pursue the administrative remedies prescribed by §4221(a) of ERISA, as amended by the MPPAA, 29 U.S.C. §1401(a) for the resolution of disputes regarding an employer's withdrawal liability.

WHEREFORE, counterclaimant prays:

A. That it have judgment against counterdefendant for the sum of $268,168.81;

B. For interest on the aforesaid sum at the rate permitted by §502(g)(2) of ERISA, as amended;

C. For an additional sum, equal to the greater of liquidated damages provided by the Pension Plan of the Construction Laborers Pension Trust for Southern California or interest on the aforesaid sum, in the amount specified by §502(g)(2) of ERISA, as amended;

D. For reasonable attorneys' fees;

E. For costs of suit; and

F. For such other legal and equitable relief as the Court shall deem necessary for the enforcement of CPPC's payment obligation.

DATED: December 16, 1982.

COX CASTLE & NICHOLSON

By /s/ James P. Watson
James P. Watson

Attorneys for Defendant and Counterclaimant

EXHIBIT A

COLLECTION OFFICE

THE CONSTRUCTION LABORERS' PENSION TRUST

FOR SOUTHERN CALIFORNIA

3540 Wilshire Boulevard, Suite 512 •
Los Angeles, California 90010

Telephone (213) 383-3151

January 20, 1982 (logo)

CEN-VI-RO Concrete Pipe Products Co., Inc.
P. O. Box 103
Lockeford, California 95237

Gentlemen:

Our records indicate that you have not contributed to the Construction Laborers Pension Trust Fund ("Plan") since February 1981. We are further advised that you have not signed a renewal of a collective bargaining agreement obligating you to continue contributions to the Plan on behalf of the Construction laborers currently in your employ.

Based on this information, we conclude that you have chosen to withdraw from the Plan. Accordingly, you are subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, a federal enactment amending the Employee Retirement Income Security Act of 1974 ("ERISA").

This statute, as you probably know, provides that when an employer withdraws from participation in a multiemployer pension plan, the withdrawing employer is obligated to the Plan for a portion of the Plan's unfunded

vested benefit liabilities as of the end of the Plan year immediately preceding the date of the employer's withdrawal.

Pursuant to the provisions of this 1980 statute and to the implementing regulations promulgated by the Pension Benefit Guaranty Corporation, the Board of Trustees of the Plan have adopted certain methods of calculating the withdrawal liabilities applicable to you. These calculations are summarized on the attached form. They indicate that your withdrawal liability amounts to $268,168.81.

If, as anticipated by the Plan, the Pension Benefit Guaranty Corporation issues regulations on the assumptions which may be used to calculate withdrawal liability and these assumptions authorize the Plan to assess a withdrawal liability amount which is greater than that set forth in the preceding sentence, then the Plan will deem the withdrawal liability owed by you to be the greater amount.

You may pay the withdrawal liability set forth in the preceding paragraph in a single lump sum payable within 60 days after your receipt of this letter.

Should you decline to so pay, ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980, provides a method for calculating periodic installment payments by which you may satisfy your withdrawal liability arising under the statute. Using this method, we have determined that your withdrawal liability may be satisfied by 132 monthly payments in the amount of $2,821.80, and a final monthly payment of $2,226.74.

You are expressly obligated under Federal Law to commence your monthly payments on March 22, 1982.

Thereafter, your monthly payments are due on the same date of each succeeding month.

The number of months over which your payments are due will increase correspondingly with any withdrawal liability increase resulting from issuance of the Pension Benefits Guaranty Corporation regulations mentioned above. Additionally, the amount of your final and other monthly payments may vary as a result of future regulations; and your obligation may be subject to such additional steps as the Board of Trustees may require in accordance with the law.

Should you fail to make your first monthly payment by its due date, or should you fail to make any subsequent monthly payments when due, ERISA, as amended, provides that you will incur interest charges from the date your payment becomes due until the date payment is finally received. Additionally, you may incur liability for liquidated damages and other sums assessed under the delinquency provisions of the Plans' Trust Agreement. The rate of interest at which you will be assessed is that rate equal to the per annum rate of interest established by the Federal Reserve Board of San Francisco on advances to member banks under Sections 13 and 13(a) of the Federal Reserve Act prevailing on the 25th day of the month preceding the date on which your payment became due plus five (5) percent. This rate of interest is subject to change if the Pension Benefit Guaranty Corporation issues regulations providing a different rate of interest.

More importantly, should you fail to pay any monthly payment plus interest within 60 days after receiving written notice from the Plan that such payment is delinquent, or should you commit any other act which the Plan has deemed to constitute a "default" in your payment obligations, ERISA, as amended, provides that the Board of Trustees may deem you to be in default and thereby liable for immediate payment of the outstanding amount of your withdrawal liability plus accrued interest on your total outstanding liability from the due date of the first payment which was not timely made.

This letter is intended to provide you with notice of your liability and payment obligations and of the existence of ERISA, as amended, and of some of its provisions. This letter is not intended as an explanation of the statute, nor shall it be construed as limiting in any way the rights of the Plan under the statute.

Very truly yours,

/s/ Dan O'Connell
DAN O'CONNELL
Auditor

DO:am

cc: Southern California District Counsel of Laborers

CERTIFIED MAIL - RETURN RECEIPT

Cen-Vi-Ro Concrete
Pipe & Prod. Co., Inc.

JAN 25 1982

RECEIVED
LOCKEFORD

WORKSHEET FOR ESTIMATING WITHDRAWAL LIABILITY FROM THE SOUTHERN CALIFORNIA LABORERS PENSION TRUST DURING YEAR ENDED DECEMBER 31, 1981

1. What were your company's contributions to the Pension Fund during the five years ending:

a. December 31, 1979	$146,699.67
b. December 31, 1980	$118,520.96

2. The aggregate Pension Fund contributions on behalf of continuing employers during these five years were as follows:

a. December 31, 1979	$273,549,700
b. December 31, 1980	$320,467,000

3. Percent of total Pension Fund contributions for which you were obligated:

a. Divide la by 2a	$.000536282
b. Divide 1b by 2b	$.000369838

4. The Pension Fund's aggregate unfunded vested liability pools as of December 31, 1980 are as follows:

a. Pool as of December 31, 1979	$468,656,500
b. Pool as of December 31, 1980	$45,524,700

5. Your estimated withdrawal assessment before the offset is determined as follows:

a. Line 3a multiplied by line 4a	$251,332.05
b. Line 3b multiplied by line 4b	$16,836.76
c. Total of a and b	$268,168.81

6. Offset amount: $ -0-

   - If line 5c is less than $100,000, then the offset amount equals $50,000.

   - If line 5c is greater than $150,000, then the offset amount equals $0.
   - If line 5c exceeds $100,000 but is less than $150,000, then the offset amount equals $50,000 minus the amount by which line 5c exceeds $100,000; for example, if line 5c equals $130,000, then the offset amount equals $20,000.

7. Your estimated withdrawal assessment equals line 5c less line 6: $268,168.81

(Certificate Of Service Omitted In Printing)

DENNIS R. MURPHY
DIEPENBROCK, WULFF, PLANT & HANNEGAN
455 Capital Mall, Suite 800
Sacramento, California 95814
Telephone: (916) 444-3910

Attorneys for Defendant,
CEN-VI-RO CONCRETE PIPE
& PRODUCTS CO.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Plaintiff -vs- CEN-VI-RO CONCRETE PIPE & PRODUCTS CO., INC., Defendant.	No. 82-5184 MML (JRx) ANSWER TO COMPLAINT FOR WITHDRAWAL LIABILITY (Filed Dec. 28, 1982)

COMES NOW Defendant, CONCRETE PIPE & PRODUCTS COMPANY OF CALIFORNIA, erroneously sued as CEN-VI-RO CONCRETE PIPE & PRODUCTS CO., INC. (hereinafter "CP & P") and for its response to the complaint on file herein, CP & P admits, denies and alleges as follows:

1) In response to Paragraph 1, 2, 4, 5, 12, 13, 14 and 15, Defendant, CP & P, admits the allegations thereof.

2) In response to Paragraph 3, 10 and 11, Defendant lacks sufficient information and belief to enable it to respond thereto and on this basis, denies, generally and specifically, conjunctively and disjunctively, each and every allegation contained therein.

3) In response to the allegations contained within Paragraph 16 and 17 of the complaint on file herein, Defendant denies, generally and specifically, conjunctively and disjunctively, each and every allegation contained therein.

4) In response to Paragraph 6 of the complaint on file herein, Defendant, CP & P, alleges that it ceased covered operations by terminating its business at its plant covered under the Collective Bargaining Agreement requiring contributions to the Construction Laborers Pension Trust for Southern California (hereinafter "C.L.P.T." or "Trust"). Between August and October of 1979, it dismantled its plant and effectuated its plan to terminate its operation entirely. No work was performed under the Collective Bargaining Agreement requiring contributions to C.L.P.T. between November, 1979 and May, 1980. During the first week of May of 1980, one employee was hired to ship the last piece of machinery remaining at the plant of CP & P. Forty-eight Dollars ($48.00) was contributed to C.L.P.T. in June of 1980 for the forty (40) hours of work performed in May, 1980, by the one employee involved in the process of shipping the last piece of machinery. Except as so admitted, the allegations of Paragraph 6 are denied, generally and specifically, conjunctively and disjunctively.

5) In response to Paragraph 7 of the complaint on file herein, CP & P alleges that in August of 1979, it ceased its covered operations and thus withdrew from the C.L.P.T. as that term became defined by the Multi-Employer Pension Plan Amendment Act ("MPPAA"). Except as so admitted, CP & P denies, generally and specifically, conjunctively and disjunctively, each and every allegation contained therein.

6) In response to Paragraph 8 of the complaint on file herein, CP & P alleges that from and after November 1, 1981, it advised the SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS that it no longer had an obligation to recognize and bargain with that Union. Except as so admitted, CP & P denies, generally and specifically, conjunctively and disjunctively, all the allegations contained in Paragraph 8 of the complaint on file herein.

7) In response to the allegations contained in Paragraph 9 of the complaint on file herein, Defendant, CP & P, alleges that it effected a "complete" withdrawal as that term became defined by Section 4203 of E.R.I.S.A., (as amended, 29 U.S.C. §1383) from the C.L.P.T. in August of 1979 when it ceased covered operations. Except as so admitted, Defendant denies, generally and specifically, conjunctively and disjunctively, each and every allegation contained therein.

FIRST AFFIRMATIVE DEFENSE

8) On August 17, 1979, CP & P ceased operation at its plant, sold its inventory and commenced the closure of the plant. By November of 1979, CP & P had removed a

large majority of its machinery and production equipment and had shipped such machinery and production equipment to its facilities in Sacramento, California. All employees covered by the plan were were terminated by no later than the end of October, 1979.

9) Sections 4201(b)(2) and 4203(a) of E.R.I.S.A., as amended, [29 U.S.C. §§1380 and 1382] provide that a complete withdrawal under the term of E.R.I.S.A. occur when an employer permanently ceases all covered operations under the plan. Under that definition, CP & P accomplished a complete withdrawal in August, 1979 over seven (7) months prior to retroactive effective date of MPPAA and over one (1) year prior to the passage of MPPAA. As CP & P withdrew from the plan prior to the retroactive effective date of MPPAA, no liability can be assessed against it.

SECOND AFFIRMATIVE DEFENSE

10) Sections 4219 and 4221(b) of E.R.I.S.A., as amended, [29U.S.C. §§1399, 1401(b)], requires any employer who contests either the existence, the amount, or payment schedule, or the withdrawal liability claims, to nonetheless commence payment of the purported obligations as demanded before the employer has had an opportunity to contest the validity. Moreover, the MPPAA affords the employer no procedural protection whatsoever against the risk of erroneous deprivation of its property rights prior to a hearing on its exceptions to the withdrawal liability claim. The ex parte determinations by the Trust, regarding the existence, an amount of withdrawal liability, are not subject to the scrutiny of any

disinterested third party prior to payments being required. No bond is required to secure the return of any payments made by the employer and no interest paid thereon. If the employer successfully contests the existence or the amount of the withdrawal liability claim at a post-payment hearing, there exists no provision for repayment to the employer of overpayments. For each and all the foregoing reasons, §§4219 and 4221(b) of E.R.I.S.A., as amended, deprive CP & P of its property without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

THIRD AFFIRMATIVE DEFENSE

11) Sections 4211 of E.R.I.S.A., as amended, [29 U.S.C. §1401] compels an employer who disputes either the existence or amount of the claim withdrawal liability to arbitrate the dispute rather than contest its validity in a court of law wherein the facts upon which the existence and amount of the withdrawal liability depends may be determined by a jury. Moreover, §4221 precludes the assertion of constitutional defenses in the course of arbitration proceedings and gives the withdrawal liability determinations of the trust a presumption of correctness that has no rational basis of fact, thereby delegating to a private party having a self interest in the outcome, the power to make presumptably valid and potentially conclusive determinations of law and fact affecting the existence and the amount of withdrawal liability due. for each and all of the foregoing reasons, §4221 of the MPPAA deprives CP & P of its constitutional right of access to the Court and due process of law guaranteed by the Fifth Amendment, and to a jury determination of

contested issues of fact guaranteed by the Seventh Amendment to the Constitution of the United States.

FOURTH AFFIRMATIVE DEFENSE

12) Section 3201(a) of E.R.I.S.A., as amended, [42 U.S.C. §1381(a)] imposes liability on an employer who affects a complete withdrawal from a Multi-Employee [sic] Pension Plan. Retroactively applied to a withdrawal occurring prior to the enactment of MPPAA into law, it impairs and abrogates pre-existing contractual rights and statutory limitations of liability upon which CP & P was entitled to rely in assessing its potential exposure to the trust on determination of its business. As retroactively applied to an event occurring prior to its enactment into law, the MPPAA failed to give CP & P fair warning or an opportunity to avoid withdrawal liability by altering its behavior. Moreover, the whole retroactive liability is determined and measured by factors that are wholly outside the control of CP & P and are largely unrelated to any act, omission, or fault of CP & P, or to any employer-employee relationship in which CP & P was involved at any time. For each and all of the foregoing reasons, §4201(a) of E.R.I.S.A., as amended, as retroactively applied to CP & P, deprived CP & P of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

FIFTH AFFIRMATIVE DEFENSE

13) Section 4201(a) of E.R.I.S.A., as amended, as retroactively applied to withdraw occurring prior to the enactment of MPPAA into law, impairs and abrogates

contractual rights without affording any compensation whatsoever for its loss. Moreover, the wholly retroactive withdrawal liability which the Trust seeks to impose on the basis of §4201(a) greatly dilutes the aggregate worth of CP & P. If required to pay the retroactively imposed withdrawal liability claimed by the Trust under §4201(a), CP & P's assets will be seriously dissipated. Notwithstanding the debilitating impact on CP & P of the potential liability which the Trust seeks to impose on CP & P under MPPAA, no compensation whatsoever will be paid to CP & P. For each and all of the foregoing reasons, §4201(a) of E.R.I.S.A., as amended, as the Trust seeks retroactively to apply it to CP & P, would affect a taking of CP & P's property for public use without affording just compensation in violation of the Fifth Amendment to the Constitution of the United States.

SIXTH AFFIRMATIVE DEFENSE

14) Section 4201(a) of E.R.I.S.A., as amended, both on its face and as retroactively applied to a "complete withdrawal" as defined in §4203, [24 U.S.C. §1383] affords no intelligible basis upon which liability can be ascertained or measured. Because of the ambiguity and vagueness of the terms used to determine the existence and the amount of the imposed withdrawal liability, men of ordinary intelligence necessarily must guess as to the meeting [sic], and differ as to the application of the statutory language upon which the existence and amount of withdrawal liability depends. The MPPAA fails to give fair warning of the conduct for which, and the circumstances in which, withdrawal liability may be imposed, and its provisions for measuring the amount of liability to

be imposed are so standardless that they are incapable of rationale, consistent, and fair application. For each and all of the foregoing reasons, the MPPAA deprives CP & P of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

SEVENTH AFFIRMATIVE DEFENSE

15) The Trust is Taft-Hartley Trust Fund. As provided in 29 U.S.C. §186, the Trust is composed of an equal number of union and management trustees, each extensively safeguarding the rights of its respective constituents. Upon passage of E.R.I.S.A. 1974, the obligation of the trustees became clouded by an apparent conflicting obligation to pension plan beneficiaries. Indeed, recent Supreme Court pronouncements hold that the Trustees are Fiduciaries obligated to protecting the plan beneficiaries only. The confusion caused by these conflicting congressional enactments had left all parties unsure of their rights and obligations. The MPPAA does not take account of this confusion, which made it impossible for CP & P to take defensive measures to lessen any unfunded liability to the Trust. The MPPAA gives CART BLANCHE authority to parties over whom CP & P has no control to seize CP & P's assets on demand in satisfaction of a liability CP & P had no hand in creating. For each of the foregoing reasons, the MPPAA deprived CP & P of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

EIGHTH AFFIRMATIVE DEFENSE

16) E.R.I.S.A. provides that pension plans are either "defined benefit plans" or "defined contribution plan". The MPPAA arbitrarily assumes that a Multi-Employer Pension Plan in the construction industry, like the instant pension plan, are necessarily defined benefit pension plan which promises a certain level of benefits to participants. The instant pension plan expressly disclaims any promise of a particular level of benefits and beneficiaries are well aware of this. Although Congress may have had the authority to declare that the pension plans are a defined benefit plan for such limited purposes as having the Pension Benefit Guarantee Corporation assess such plan a nominal premium in order to finance insurance protection for the benefits of pension plan beneficiaries. It is patently irrational and arbitrary for congress to provide in MPPAA that multi-employer pension plans are necessarily defined benefit plans for the purposes of withdrawal liability. For each and all of the foregoing reasons, the MPPAA deprived CP & P of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States. Furthermore, the plan involved herein expressly held itself out as a defined contribution plan with no promise of any benefit level and is thus estopped from now claiming that it is a defined benefit plan and entitled to receive and procure unfunded vested liabilities.

NINTH AFFIRMATIVE DEFENSE

17) The MPPAA is arbitrary and capricious in holding employers, like CP & P, responsible for the unfunded

liability of pension plans. Employers, like CP & P, have no control over the adminstration of Multi-Employer Pension Plan, the setting of benefit levels, investment decisions, etc. To the extent that there is a likelihood that CP & P's withdrawal creates any possibility that "promised" benefits will not be adequately funded, the MPPAA arbitrarily and capriciously holds only employers like CP & P responsible. The MPPAA thereby discriminates against such employers in as much as such employers are the least responsible for any unfunded vested liability of the Trust. Rather, the cause of the problem lies primarily with the beneficiaries themselves, who, by demanding and receiving higher wage rates, have made union labor increasably uncompetitive, and with the Trustees over whom employers, like CP & P, have no control whatsoever and who have set excessively high target benefit levels without providing for a corresponding increase in contribution revenues sufficient to satisfy vested benefits for planned beneficiaries.

TENTH AFFIRMATIVE DEFENSE

18) By its letter of March 2, 1982, CP & P requested of the Trust certain information in accordance with its rights under §4219(b)(2)(a) of E.R.I.S.A., as amended. As of this time, the Trust has failed to respond to whose such request for information as it is required of it under §4219(b)(2)(B) of E.R.I.S.A., as amended. For this reason, the Trust is estopped from asserting any unfunded withdrawal liability in this action.

ELEVENTH AFFIRMATIVE DEFENSE

19) The complaint fails to state facts upon which relief can be granted.

WHEREFORE, CP & P prays for relief as follows:

1. that this court assume jurisdiction of this complaint and CP & P's consolidated complaint for declaratory and injunctive relief;

2. that this court enjoin the Trust and its Trustees, agents, employees, attorneys, representatives and/or successors from taking any action whatsoever described by §§4219 and 4221 of E.R.I.S.A., as amended, [29 U.S.C. §§1399 and 1401] to prosecute and force or collect its withdrawal liability claim or to penalize CP & P for non-compliance with the Trust's demand for payment hereof;

3. to enter a declaratory judgment that:

a) CP & P ceased all covered operations before the retroactive effective date of MPPAA and thus completely withdrew from the Trust as that term was later defined in MPPAA so that CP & P is not covered by MPPAA and thus has no withdrawal liability and no duty to arbitrate;

b) §4219 of MPPAA, 29 U.S.C. §1399 is unconstitutional and void insofar as it infringes the right to due process of law guaranteed by the Fifth Amendment as alleged in the affirmative defenses and in the consolidated complaint of CP & P;

c) that §4221 of E.R.I.S.A., as amended, [29 U.S.C. §1401] is unconstitutional and void insofar as it infringes the right to access to the court and due process of law guaranteed by the Fifth

Amendment, and the right to a jury trial guaranteed by the Seventh Amendment, as alleged in the affirmative defenses herein and CP & P's consolidated complaint herein;

d) Section 4201(a) of the MPPAA [29 U.S.C. §1381(a)] is unconstitutional and void as it infringes the right to due process of law guaranteed by the Fifth Amendment, as alleged in the affirmative defenses herein, and the consolidated complaint of CP & P herein;

e) Section 4201(a) of E.R.I.S.A., as amended, [29 U.S.C. §1381(a)] is unconstitutional insofar as it infringes the right to due process of law as alleged in the affirmative defenses herein and in the consolidated complaint herein;

4. that Plaintiff take nothing by its complaint on file herein;

5. that CP & P recover under its consolidated complaint on file herein:

6. grant CP & P its costs and disbursements herein;

7. grant CP & P its attorney's fees under §29 U.S.C. §§1451(a)(1) and 1451(e); and

8. grant CP & P such other and further relief as the Court may deem appropriate.

DATED: December (illegible), 1982.

DIEPENBROCK, WULFF, PLANT
& HANNEGAN

BY: /s/ Dennis R. Murphy
DENNIS R. MURPHY
Attorneys for Defendant,
CONCRETE PIPE &
PRODUCTS CO.

(Certificate of Service omitted in printing)

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Attorneys for CONSTRUCTION LABORERS
PENSION TRUST FOR SOUTHERN CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Plaintiff, vs. CEN-VI-RO CONCRETE PIPE & PRODUCTS, INC., Defendant.	Case No. 82-5184-MML (Consolidated under low number rule with)
CONCRETE PIPE & PRODUCTS COMPANY OF CALIFORNIA, Plaintiff,	Case No. 83-132-MML STIPULATION OF FACTS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

vs.) Date: March 19, 1984
) Time: 10:00 a.m.
CONSTRUCTION LABORERS) Courtroom: 12
PENSION TRUST FOR)
SOUTHERN CALIFORNIA,)
) (Lodged Feb. 15, 1984)
Defendant.)
)

All parties to these consolidated actions stipulate that there is no genuine issue of material fact with respect to the following:

1. Concrete Pipe and Products Co., Inc., of California is a California corporation doing business within the Central District of California.

2. The CLPT is an express trust organized under the Labor Management Relations Act of 1947. The CLPT is a multi-employer benefit plan within the meaning of the MPPAA.

3. On and before November 30, 1976, a plant for the manufacture of concrete pipe located at Shafter, California, was owned by Cen-Vi-Ro Concrete Pipe and Products Company ("Cen-Vi-Ro"). As of December 1, 1976, this plant became owned by CP&P and has been owned by it at all times since that date.

4. CP&P is a manufacturer of concrete pipe. CP&P engaged in the manufacture of concrete pipe at the Shafter plant. Its products were then sold and subsequently installed by the employees of other employers at construction sites. The manufacturing of concrete pipe by CP&P always took place at the plant and such manufacture was not conducted in connection with or at the site where the concrete pipe was to be used in construction.

The primary industrial functions of the Shafter plant involved the manufacturing of concrete pipe, the yard storage of completed pipe, and the loading of pipe onto trucks for shipment.

5. The Shafter plant is located on approximately forty acres of property on the corner of San Diego and Beech Streets in Shafter, California. The buildings on the property include an office building, steam tunnel, storage building, maintenance building, two cage buildings, and a machine building.

6. The CLPT is an express trust formed under a trust agreement entered into among the Southern California District Council of Laborers ("Union") and several multi-employer associations. CLPT primarily covers employees in the building and construction industry. The CLPT is managed by a board of trustees. Half of the trustees are selected by the Union and the other half are selected by the multi-employer associations.

7. CLPT derives revenues from employer contributions made by employers bound to collective bargaining agreements with the Union. These collective bargaining agreements require signatory employers to make contributions to the CLPT for each hour worked by employees within the bargaining units covered by the collective bargaining agreements involved.

8. Cen-Vi-Ro and the Union (as well as the affiliated Local 220 located in Bakersfield) were signatories to such a collective bargaining agreement as described above prior to November 30, 1976, covering the terms and conditions of work (including CLPT coverage) of employees represented by Local 220 at the Shafter plant.

9. On December 1, 1976, and thereafter, CP&P honored the terms of the collective bargaining agreement between Cen-Vi-Ro and the Union (and Local 220) which expired in 1978. On November 27, 1978, the Shafter Plant of CP&P entered into a new collective bargaining agreement with the Union (and Local 220) which likewise provided for contributions to CLPT for each hour worked by employees within the bargaining unit covered by the collective bargaining agreement. This agreement contained the following clause regarding termination:

> "This Agreement shall remain in full force and effect until June 30, 1981, and then thereafter from year to year until either party hereto shall give notice in writing to the other party of a desire to change, modify or terminate this Agreement.
>
> "Such written notice shall be given at least sixty (60) days prior to June 30, 1981, or June 30th of each year thereafter. If no agreement is reached by June 30, 1981, or June 30th of any year thereafter, the Employer or the Unions may thereafter give written notice to the other that on a specified date not less than fifteen (15) days after the date of said notice, the Agreement shall be considered terminated."

10. Pursuant to the trust fund contribution provisions of the agreement CP&P signed on November 27, 1978, and the trust fund contribution provisions of the agreement between Cen-Vi-Ro and the Union (and Local 220) that CP&P had honored since December 1, 1976, CP&P paid into CLPT a total of $102,656.68.

11. On April 23, 1981, the Union sent an approriate [sic] notice of reopening the collective bargaining

agreement for negotiations. On May 1, 1981, CP&P sent timely notice of its desire to reopen the collective bargaining agreement for negotiations. (A copy is attached as Exhibit "A".)

12. The Union responded with a letter dated May 12, 1981. (A copy is attached as Exhibit "B".)

13. No negotiations were conducted until October of 1981. Negotiation sessions were then held in both October and November 1981. The second such negotiation session, held in November 1981, resulted in an impasse between the parties. On November 30, 1981, counsel for CP&P wrote the Union. (A copy is attached as Exhibit "C".)

14. On August 17, 1979, CP&P ceased production at the Shafter Plant. This is reflected by the business records called "Operations Analysis" showing 347.30 tons of concrete pipe produced in August, 1979, as compared to 773.05 the previous month. This record shows zero production for the months of September, October, November, and December 1979, as well as for the months of January 1980 through October 1981.

15. In November 1981, the Shafter plant started production again. The Operations Analysis show that there were 10.58 tons of concrete pipe produced at the Shafter plant during that month.

16. In August 1979, CP&P ceased buying materials to make products at the Shafter plant, commenced laying off its employees at that facility, and started removing machinery from the premises, shipping the machinery to Sacramento for use in operations CP&P was engaged in at its plant in that city.

17. CP&P employees who were engaged in covered operations worked 1,781 3/4 hours in August 1979, 65 in September 1979, and 24 in October.

18. From October 1979 through October 1981, the only full-time employees who worked at the Shafter plant were Offie Harness, who worked full-time from October 1979 until December 31, 1980, and J.W. Hensley, who worked full-time from November 1979 through the reopening of the plant in November 1981.

19. Besides Harness and Hensley, the only other employees who worked at the Shafter plant from November 1979 through October 1981 were Haskel Ray and Jesse Plaza. Ray was a laborer who was recalled from layoff in May 1980 to work for 40.5 hours with a crew from the Sacramento facility in helping load a large piece of concrete pipe manufacturing equipment known as a "CVR" and component parts for shipment from the Shafter plant to the Jackson Road plant in Sacramento. The equipment was then shipped on May 9, 1980. Plaza was a maintenance man who worked 47 hours in January 1980.

20. For the hours worked by Ray in May 1980, CP&P contributed $48.60 to CLPT. This was the last contribution made by CP&P to the CLPT.

21. With the resumption of production in November 1981, the Shafter plant employed persons within the classification of laborers formerly covered by the scope of the 1978 to 1981 collective bargaining agreement between CP&P and the Union (and Local 220).

22. By letter of January 20, 1982, CLPT notified CP&P of its alleged withdrawal liability of $268,168.81

and demanded payment in accordance with a prescribed schedule. (A copy of the letter is attached as Exhibit "D".)

23. CP&P has not made any payment on the alleged withdrawal liability.

24. CP&P's financial statements for the fiscal years 1981 and 1982 and the six month balance sheet ending June 30, 1983 are attached as Exhibit "E", 1-3.

25. CLPT has not defaulted upon any loan or other obligation, nor has it failed to pay a pension benefit payment when such payment was legally due.

26. CLPT has not been financially incapable of paying any scheduled benefit to any of its beneficiaries.

27. CLPT has been informed by its independent actuary, the Martin E. Segal Company, Inc., that as of December 31, 1981, it had an aggregate unfunded vested liability of $532,621,400; as of December 31, 1980, it had an aggregate unfunded vested liability of $514,181,200; and as of December 31, 1979, it had an aggregate unfunded vested liability of $532,621,400 [sic]. (A copy of the actuary's January 1, 1982, report is attached as Exhibit "F".)

28. No shareholder, officer, director, agent, or representative of CP&P has, during the period from 1976 to the present date, had any participation in:

(a) the investment decisions pertaining to any assets of CLPT;

(b) the decisions of CLPT to adjust pension benefit levels;

(c) the decisions affecting CLPT's administrative costs; or

(d) the selection of actuarial assumptions or methods or accounting principles or methods upon which CP&P's asserted withdrawal liability has been calculated.

29. CLPT's decisions are made by its trustees. The employer-appointed trustees are selected by members of the multi-employer associations that are signatory to the Master Labor Agreement (being the Building Industry of California, Inc., the Engineering Contractors Association, and the Southern California Contractors Association, Inc.). At no time did CP&P choose to apply for membership in or belong to any of these multi-employer associations.

30. CP&P has never been denied membership in any of the above multi-employer associations.

31. The collective bargaining agreement which CP&P signed on November 27, 1978, did not guarantee or specify any certain pension benefit levels for pension beneficiaries.

32. Article IV, §§ 4.07 and 4.08 of the Declaration of Trust of the CLPT provides:

"Section 4.07. Neither the Association or (sic) any officer, agent, employee or (sic) committee member of the Associations shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he may incur liability as a Trustee as hereinafter provided. The liability of any Individual Employer

to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operation of the Fund or of the Pension Plan, except as may be hereafter provided in the Collective Bargaining Agreements.

"Section 4.08. Neither the Associations, any Individual Employer, the Union, any Local Union, nor any Employee shall be liable or responsible for any debts, liabilities or obligations of the Fund or the Trustees."

33. Article X(E)(4)(b) of the Laborers' Craft Special Working Rules and Wage Scales which is Appendix K to the Southern California Master Labor Agreements provides:

"IMPORTANT.

PENSION BENEFITS ARE NOT AND HAVE NEVER BEEN GUARANTEED. THEY ARE PAYABLE ONLY TO THE EXTENT THAT THE FUND HAS ASSETS TO PAY BENEFITS. NEITHER YOUR EMPLOYER NOR YOUR UNION HAS ASSUMED ANY LIABILITY, DIRECTLY OR INDIRECTLY, TO PROVIDE MONTHLY PENSION BENEFITS. YOUR EMPLOYER'S

SOLE OBLIGATION IS TO MAKE THE CONTRIBUTIONS CALLED FOR IN ITS COLLECTIVE BARGAINING AGREEMENT. THE PENSION PLAN HAS ALSO BEEN CONSIDERED BY THE EMPLOYERS, THE UNION AND THE TRUSTEES TO BE A DEFINED CONTRIBUTION PLAN.

34. Article X, § E(4) of the 1977-1980 Master Labor Agreement provides:

> "The parties recognize and agree that the Pension Trust and Plan was created, negotiated, and is intended to continue to be if permitted by law under ERISA, a defined contribution plan and trust and that the individual Contractors' liability with regard to the pension has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements."

35. The CLPT is not a signatory to either of the agreements quoted from the immediately preceeding two paragraphs. The labor agreements are contracts between the Unions and the multi-employer associations.

36. All parties reserve their rights to argue the relevancy of any of the above agreed facts.

COX, CASTLE & NICHOLSON
James P. Watson
Everitt G. Beers

February 9, 1984

By: /s/ Everitt G. Beers
Everitt G. Beers,
Attorneys for the Construction Laborers Pension Trust for Southern California

DIEPENBROCK, WULFF, PLANT & HANNEGAN
Dennis R. Murphy
Edmund K. Brehl

February 14, 1984

By: /s/ Dennis R. Murphy
Dennis R. Murphy,
Attorneys for Concrete Pipe & Products Company, Inc., of California

(Certificate of Service omitted in printing)

Exhibit A

SOUTHERN CALIFORNIA DISTRICT COUNCIL
OF
LABORERS
AFFILIATED WITH
LAUDERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
3540 WILSHIRE BOULEVARD, SUITE 910
LOS ANGELES, CALIFORNIA 90010
TELEPHONE 360-6720

[LOGO]
LOUIE BRAVO PRESIDENT
WILLIAM R. McCLAIN SECRETARY-TREASURER
RAY M. WILSON BUSINESS MANAGER

April 23, 1981

Cen-Vi-Ro Pipe Corporation
P.O. Box 1416
Shafter, California 93263

Gentlemen:

In accordance with the terms of Article XV of the collective bargaining agreement between your Corporation and

the International Union of Operating Engineers Local 12, the Southern California District Council of Laborers, Laborers International Union of North America Local #220, Teamsters, Chauffeurs, Warehousemen and Helpers Local 87, and the Kern, Inyo and Mono Counties Building and Construction Trades Council, notice is hereby given of the Union's desire to change, modify or terminate this agreement.

Failing to reach a satisfactory settlement within the terms of Article XV, we will be governed by the terms of said Article with respect to termination.

We are ready to meet on a date mutually convenient to all parties.

Very truly yours,

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS

/s/ Louie Bravo Pres.

/s/ _____ Sec'y

/s/ Ray M. Wilson Bus. Mgr.

LAW OFFICES

DIEPENBROCK, WULFF, PLANT & HANNEGAN

455 CAPITOL MALL

SACRAMENTO, CALIFORNIA 95814

(916) 444-3910

May 1, 1981

Subject: Concrete Pipe & Products Co., Inc.

Laborers' International Union
of North America
Local Union No. 220
2201 "H" Street
Bakersfield, Ca

Gentlemen:

By certified letter of April 15, 1981, the International Union of Operating Engineers, Local 12 gave to Concrete Pipe & Products Co., Inc. formal notice of its desire to reopen the existing collective bargaining agreement between Concrete Pipe and itself covering Concrete Pipe's plant at Shafter, California. The letter did not specify whether the Laborers' Local No. 220 was joining in the notice.

Concrete Pipe & Products Co., Inc. assumes that the Laborers' Local No. 220 was, in fact, joining in the notice. If this is not a correct assumption, then Concrete Pipe & Products Co., Inc. desires that negotiations be reopened as to all of the unions.

As you are probably aware, the plant of Concrete Pipe and Products Co., Inc. in Shafter, California has been

shut down for over one year. There are no current employees and no current plans to reopen the plant. Nonetheless, if you feel that there is some reason for meeting at this time with respect to the renewal of this contract which is soon to expire, please contact me so that we can discuss the formalities of the negotiations, the pertinent issues and arrange a date for negotiations.

Very truly yours,

/s/ Dennis R. Murphy
DENNIS R. MURPHY

cc: Concrete Pipe & Products Co., Inc.

CERTIFIED/RETURN RECEIPT REQUESTED

EXHIBIT B

SOUTHERN CALIFORNIA DISTRICT COUNCIL

OF

LABORERS

AFFILIATED WITH
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
3540 WILSHIRE BOULEVARD, SUITE 910
LOS ANGELES, CALIFORNIA 90010
TELEPHONE 360-6720

[LOGO]
LOUIE BRAVO PRESIDENT
WILLIAM R. McCLAIN SECRETARY-TREASURER
RAY M. WILSON BUSINESS MANAGER

May 12, 1981

Mr. Dennis R. Murphy
Diepenbrock, Wulff, Plant &
Hannegan
455 Capitol Mall
Sacramento, Ca 95814

Re: File No. 14131/15c
Concrete Pipe & Products Co., Inc.

Dear Mr. Murphy:

Thank you for your letter of May 1, 1981 addressed to our affiliate Local No. 220, Bakersfield.

We assume from your letter that it was dictated before you received from your client the notice of reopening sent to your client by the Southern California District Council of Laborers on its own behalf and on behalf of its affiliated Local No. 220. We are enclosing a copy of that letter together with a copy of the signed return receipt for your records.

While we are aware that the company is not presently operating, we do feel that there is a need to negotiate right of recall of laid-off employees and the terms and conditions governing laid-off employees. For these reasons we feel that negotiation would be appropriate.

Very truly yours,
/s/ Ray M. Wilson
RAY M. WILSON
Business Manager

RMW:bg
cc: Local 220
Oper. Engineers Local 12

EXHIBIT C

LAW OFFICES

DIEPENBROCK, WULFF, PLANT & HANNEGAN

455 CAPITOL MALL

SACRAMENTO, CALIFORNIA 95814

(916) 444-3910

November 30, 1981

Subject: Concrete Pipe & Products Co., Inc.

Frank L. Todd
International Union of
Operating Engineers,
Local 12
3055 Wilshire Blvd.,
Third Floor
Los Angeles, California
90010

Johhn Wiley
Laborers' Union
Local 220
2201 "H" Street
Bakersfield, California

Don L. Frazier
General Teamsters & Food
Processing, Local
Union 87
3724 Pierce Road
Bakersfield, California
93308

Gentlemen:

During recent negotiations, Concrete Pipe & Products Company has attempted to reach agreement with you concerning the commencement of operations at its Shafter Plant. For over two years, Concrete Pipe & Products has not operated this plant and it has not employed any

employees within the jurisdiction of your unions. Furthermore, the former Collective Bargaining Agreement has expired. Nonetheless, Concrete Pipe & Products met to negotiate a new contract.

Since the commencement of operation to the plant, Concrete Pipe & Products has hired seven (7) employees, none of which have previously indicated their desire to be recognized by any of your unions. Thus, at the current time, Concrete Pipe & Products has no basis in which to continue recognition of your unions as representative of its employees and must withdraw any such recognition. If this situation should change, Concrete Pipe & Products will so advise you.

Very truly yours,

DIEPENBROCK, WULFF, PLANT
& HANNEGAN

BY /s/ Dennis R. Murphy
DENNIS R. MURPHY

cc: Bill Street
Concrete Pipe & Products

EXHIBIT D

COLLECTION OFFICE

THE CONSTRUCTION LABORERS' PENSION TRUST

FOR SOUTHERN CALIFORNIA

3540 WILSHIRE BOULEVARD, SUITE 512 •
LOS ANGELES, CALIFORNIA 90010

TELEPHONE (213) 383-3151

January 20, 1982 (logo)

CEN-VI-RO Concrete Pipe Products Co., Inc.
P. O. Box 103
Lockeford, California 95237

Gentlemen:

Our records indicate that you have not contributed to the Construction Laborers Pension Trust Fund ("Plan") since February 1981. We are further advised that you have not signed a renewal of a collective bargaining agreement obligating you to continue contributions to the Plan on behalf of the Construction laborers currently in your employ.

Based on this information, we conclude that you have chosen to withdraw from the Plan. Accordingly, you are subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, a federal enactment amending the Employee Retirement Income Security Act of 1974 ("ERISA").

This statute, as you probably know, provides that when an employer withdraws from participation in a multiemployer pension plan, the withdrawing employer is obligated to the Plan for a portion of the Plan's unfunded vested benefit liabilities as of the end of the Plan year immediately preceding the date of the employer's withdrawal.

Pursuant to the provisions of this 1980 statute and to the implementing regulations promulgated by the Pension Benefit Guaranty Corporation, the Board of Trustees of the Plan have adopted certain methods of calculating the

withdrawal liabilities applicable to you. These calculations are summarized on the attached form. They indicate that your withdrawal liability amounts to $268,168.81.

If, as anticipated by the Plan, the Pension Benefit Guaranty Corporation issues regulations on the assumptions which may be used to calculate withdrawal liability and these assumptions authorize the Plan to assess a withdrawal liability amount which is greater than that set forth in the preceding sentence, then the Plan will deem the withdrawal liability owed by you to be the greater amount.

You may pay the withdrawal liability set forth in the preceding paragraph in a single lump sum payable within 60 days after your receipt of this letter.

Should you decline to so pay, ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980, provides a method for calculating periodic installment payments by which you may satisfy your withdrawal liability arising under the statute. Using this method, we have determined that your withdrawal liability may be satisfied by 132 monthly payments in the amount of $2,821.80, and a final monthly payment of $2,226.74.

You are expressly obligated under Federal Law to commence your monthly payments on March 22, 1982.

Thereafter, your monthly payments are due on the same date of each succeeding month.

The number of months over which your payments are due will increase correspondingly with any withdrawal liability increase resulting from issuance of the Pension Benefits Guaranty Corporation regulations mentioned

above. Additionally, the amount of your final and other monthly payments may vary as a result of future regulations; and your obligation may be subject to such additional steps as the Board of Trustees may require in accordance with the law.

Should you fail to make your first monthly payment by its due date, or should you fail to make any subsequent monthly payments when due, ERISA, as amended, provides that you will incur interest charges from the date your payment becomes due until the date payment is finally received. Additionally, you may incur liability for liquidated damages and other sums assessed under the deliquency provisions of the Plans' Trust Agreement. The rate of interest at which you will be assessed is that rate equal to the per annum rate of interest established by the Federal Reserve Board of San Francisco on advances to member banks under Sections 13 and 13(a) of the Federal Reserve Act prevailing on the 25th day of the month preceding the date on which your payment became due plus five (5) percent. This rate of interest is subject to change if the Pension Benefit Guaranty Corporation issues regulations providing a different rate of interest.

More importantly, should you fail to pay any monthly payment plus interest within 60 days after receiving written notice from the Plan that such payment is delinquent, or should you commit any other act which the Plan has deemed to constitute a "default" in your payment obligations, ERISA, as amended, provides that the Board of Trustees may deem you to be in default and thereby liable for immediate payment of the outstanding amount of your withdrawal liability plus accrued interest on your

total outstanding liability from the due date of the first payment which was not timely made.

This letter is intended to provide you with notice of your liability and payment obligations and of the existence of ERISA, as amended, and of some of its provisions. This letter is not intended as an explanation of the statute, nor shall it be construed as limiting in any way the rights of the Plan under the statute.

Very truly yours,

DAN O'CONNELL
Auditor

DO:am

cc: Southern California District Council of Laborers
CERTIFIED MAIL - RETURN RECEIPT

WORKSHEET FOR ESTIMATING WITHDRAWAL LIABILITY FROM THE SOUTHERN CALIFORNIA LABORERS PENSION TRUST DURING YEAR ENDED DECEMBER 31, 1981

1. What were your company's contributions to the Pension Fund during the five years ending:

a.	December 31, 1979	$ 146,699.67
b.	December 31, 1980	$ 118,520.96

2. The aggregate Pension Fund contributions on behalf of continuing employers during these five years were as follows:

a.	December 31, 1979	$ 273,549,700
b.	December 31, 1980	$ 320,467,000

3. Percent of total Pension Fund contributions for which you were obligated:

a.	Divide 1a by 2a	.000536282
b.	Divide 1b by 2b	.000369838

4. The Pension Fund's aggregate unfunded vested liability pools as of December 31, 1980 are as follows:

a.	Pool as of December 31, 1979	$ 468,656,500
b.	Pool as of December 31, 1980	$ 45,524,700

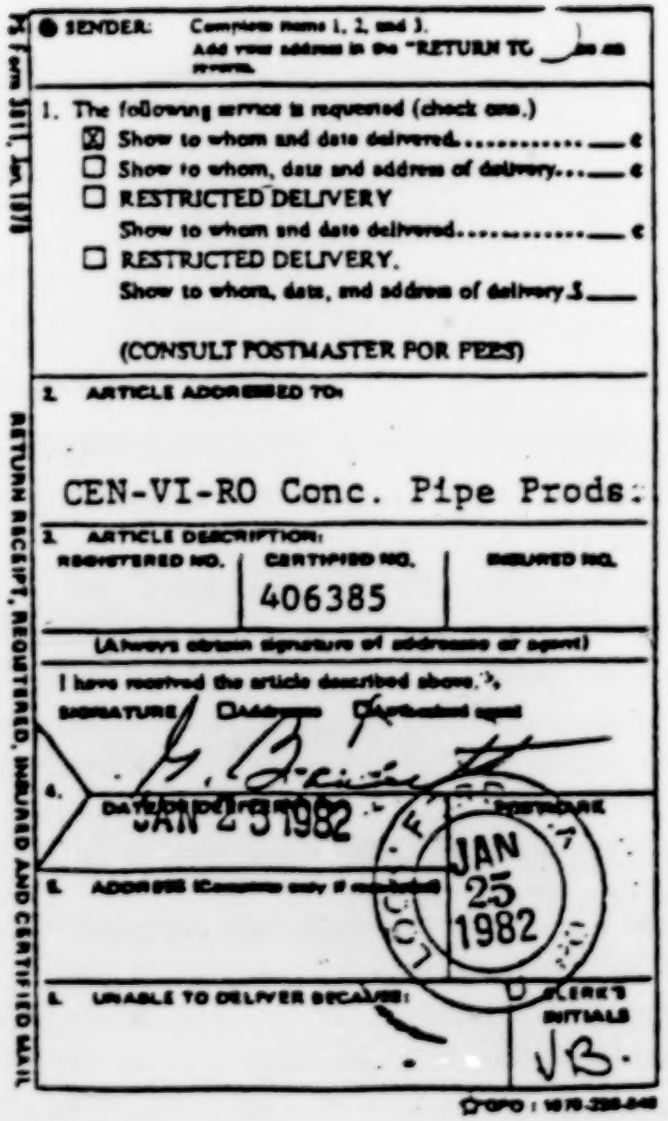
5. Your estimated withdrawal assessment before the offset is determined as follows:

a.	Line 3a multiplied by line 4a	$ 251,332.05
b.	Line 3b multiplied by line 4b	$ 16,836.76
c.	Total of a and b	$ 268,168.81

6. Offset amount: $ -0-

- If line 5c is less than $100,000, then the offset amount equals $50,000.
- If line 5c is greater than $150,000, then the offset amount equals $0.
- If line 5c exceeds $100,000 but is less than $150,000, then the offset amount equals $50,000 minus the amount by which line 5c exceeds $100,000; for example, if line 5c equals $130,000, then the offset amount equals $20,000.

7. Your estimated withdrawal assessment equals line 5c less line 6: $ 268,168.81



BEST AVAILABLE COPY

EXHIBIT E-1

CONCRETE PIPE & PRODUCTS CO., INC.
OF CALIFORNIA

FINANCIAL REPORT

December 31, 1981

OFFICERS

Stanley R. Navas, President

William H. Street, III, Executive Vice-President

Raymond E. Miles, Secretary-Treasurer

Benjamin M. Ehrhardt, Assistant Secretary-Treasurer

DIRECTORS

Stanley R. Navas — Albert M. Navas

Raymond E. Miles — William H. Street, III

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MITCHELL, WIGGINS & COMPANY

CERTIFIED PUBLIC ACCOUNTANTS
411 ROSS BUILDING
P.O. BOX 1580
RICHMOND, VIRGINIA 23213
648-7211 AREA CODE 804

The Officers and Directors
Concrete Pipe & Products
Co., Inc. of California
Lockeford, California

We have examined the accompanying Balance Sheet of Concrete Pipe & Products Co., Inc. of California, a wholly owned subsidiary of Concrete Pipe & Products Company, Inc., as of December 31, 1981, and the related Statements of Income, Retained Earnings and Changes in Financial Position for the year then ended. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the financial statements mentioned above present fairly the financial position of Concrete Pipe & Products Co., Inc. of California at December 31, 1981, and the results of its operations and the changes in its financial position for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

/s/ Mitchell, Wiggins &
Company
Certified Public Accountants

February 22, 1982

FINANCIAL STATEMENTS

BALANCE SHEET

December 31, 1981

ASSETS

CURRENT ASSETS			
Cash on hand and on deposit			$ 88,357.40
Accounts receivable:			
Trade	$ 477,856.62		
Navas Pipe Supply Company (Note 3)	44,426.07		
Employees and other	11,752.94		534,035.63
Inventories:			
Finished products	$1,279,615.67		
Work in process	110,112.67		
Raw materials	650,827.44		
Factory supplies	11,363.54		2,051,919.32
Prepaid expenses			19,310.50
TOTAL CURRENT ASSETS			$2,693,622.85

DEPOSITS				
Miscellaneous deposits				10,000.00
PROPERTY AND EQUIPMENT	**COST**	**ACCUMULATED DEPRECIATION**	**NET**	
Land	$ 181,752.78	$ –	$ 181,752.78	
Buildings	313,236.61	121,916.19	191,320.42	
Machinery and equipment	3,268,502.07	2,253,808.63	1,014,693.44	
Automobiles and trucks	115,080.69	48,212.32	66,868.37	
Office furniture and fixtures	64,505.36	40,466.24	24,039.12	
Leasehold improvements	$ 13,653.02	$ 13,653.02	–	
	$3,956,730.53	$2,478,056.40	$1,478,674.13	1,478,674.13
INTANGIBLES (Net of amortization)				
Goodwill			$ 59,731.96	
Patents			1,952.88	61,684.84
				$4,243,981.82

The Notes to Financial Statements are an integral part of this statement.

LIABILITIES AND STOCKHOLDER'S EQUITY

CURRENT LIABILITIES		
Accounts payable:		
Trade	$ 270,209.35	
CVR-CP&P/Hydro Conduit Joint Venture (Note 2)	64,116.96	
Concrete Pipe & Products Company, Inc., Parent (Note 3)	2,727,492.42	$3,061,818.73
Payroll taxes and deductions		7,249.61
Accrued pension plan contribution (Note 5)		56,698.00
Sales tax payable		14,220.91
Accrued salaries and wages		13,206.50
Accrued workmen's compensation insurance		51,786.70
Other items accrued or payable		7,750.35
TOTAL CURRENT LIABILITIES		$3,212,730.80

DEFERRED LIABILITIES		
Excess distribution from joint venture (Note 2)		48,186.45
STOCKHOLDER'S EQUITY		
Common stock – Par value $1.00 per share; Authorized 5,000,000 shares; Issued and outstanding 300,000 shares	$ 300,000.00	
Retained earnings	683,064.57	983,064.57
		$4,243,981.82

STATEMENT OF INCOME

Year Ended December 31, 1981

GROSS SALES		
Concrete pipe and products		$5,631,213.48
Freight charges		403,228.82
Shop		545,411.92
TOTAL		$6,579,854.22
Deduct – Delivery costs		467,699.72
NET SALES		$6,112,154.50
COST OF PRODUCTS SOLD		6,180,040.62
GROSS LOSS ON SALES		$ 67,886.12
OPERATING EXPENSES		
Administrative	$297,728.06	
Selling	288,012.31	
Engineering	128,561.66	714,302.03
LOSS FROM OPERATIONS		$ 782,188.15
OTHER INCOME		
Gain on disposal of property and equipment	$ 999.21	
Discounts earned	13,563.26	
Royalties	25,681.76	
Miscellaneous	103,512.13	143,756.36
TOTAL		$ 638,431.79
OTHER DEDUCTION		
Loss from joint venture		14,209.44
LOSS BEFORE INCOME TAXES		$ 652,641.23
PROVISION FOR INCOME TAXES (Note 4)		
Reduction of income tax based on California loss		48,428.41
NET LOSS		$ 604,212.82

The Notes to Financial Statements are an integral part of this statement.

STATEMENT OF RETAINED EARNINGS

Year Ended December 31, 1981

BALANCE - January 1, 1981	$1,287,277.39
Deduct - Net loss	604,212.82
BALANCE - December 31, 1981	$ 683,064.57

The Notes to Financial Statements are an integral part of this statement.

STATEMENT OF CHANGES IN FINANCIAL POSITION

Year Ended December 31, 1981

FINANCIAL RESOURCES PROVIDED BY	
Operations:	
Net Loss	~$ 604,212.82
Items which did not (provide) or require outlay of working capital during the year:	
Depreciation	643,158.73
Amortization	9,778.13
Gain on disposal of property and equipment	(999.21)
Loss from joint venture	14,209.44
WORKING CAPITAL PROVIDED BY OPERATIONS	$ 61,934.27
Proceeds from disposal of property and equipment	5,100.00
Distributions from joint venture	45,000.00
TOTAL FINANCIAL RESOURCES PROVIDED	$ 112,034.27

FINANCIAL RESOURCES APPLIED TO	
Acquisition of property and equipment:	
Machinery and equipment	$ 20,466.97
Automobiles and trucks	30,119.49
Office furniture and fixtures	2,175.69
TOTAL FINANCIAL RESOURCES APPLIED	$ 52,762.15
INCREASE IN WORKING CAPITAL	$ 59,272.12
SUMMARY OF CHANGES IN WORKING CAPITAL COMPONENTS	
Increase (decrease) in current assets:	
Cash	$ (71,877.02)
Accounts receivable	(282,306.30)
Inventories	72,588.79
Prepaid expenses	5,916.15
	$(275,678.38)

Increase (decrease) in current liabilities:	
Accounts payable	$(362,749.66)
Accrued salaries and wages	6,448.40
Sales tax payable	5,079.16
Accrued workmen's compensation insurance	9,229.14
Accrued pension plan contribution	12,502.00
Other items accrued or payable	(5,459.54)
	$(334,950.50)
INCREASE IN WORKING CAPITAL	$ 59,272.12

The Notes to Financial Statements are an integral part of this statement.

NOTES TO FINANCIAL STATEMENTS

December 31, 1981

Note 1. Summary of Significant Accounting Policies

The Company uses the direct charge-off method of accounting for bad debts. At the end of the year, the receivables are reviewed and all of the accounts which are considered uncollectible are charged off to expense.

Inventories are generally stated at the lower of cost (first-in first-out method) or market. Market is considered as the net realizable value.

Property and equipment are carried at cost. Major additions and betterments are charged to property accounts while replacements, maintenance, and repairs which do not improve or extend the life of the respective assets are expensed currently. Property and equipment purchased after December 31, 1980, are depreciated using the Accelerated Cost Recovery System as described in the Economic Tax Recovery Act of 1981. For property and equipment purchased prior to January 1, 1981, depreciation is computed using accelerated methods for substantially all new assets, while depreciation is computed using the straight-line method for used assets. These depreciation methods are used for both financial reporting and income tax purposes.

The investment in the joint venture is being accounted for by the equity method. Under the equity method the investment is carried at cost adjusted for the Company's share of the net income or loss of the investee subsequent to acquisition.

Goodwill is being amortized over fifteen years by the straight-line method. Patents are being amortized over their respective remaining lives.

Note 2. Excess Distribution from Joint Venture

Concrete Pipe & Products Co., Inc. of California has a 60% interest in a joint venture doing business under the name of CVR-CP&P/Hydro Conduit. This joint venture was formed to produce so much of the concrete pipe required by the Sacramento Regional County Sanitation District as the joint venture was the successful bidder. As of December 31, 1981, the joint venture had produced and delivered all of the pipe required for the project. However, the joint venture remains in existence pending settlement of certain legal matters.

As mentioned in Note 1, the joint venture has been accounted for on the equity method. The changes in the investment account are summarized below:

Balance – January 1, 1981			$11,022.99
Deduct:	Withdrawals	$45,000.00	
	Share of loss	14,209.44	59,209.44
Balance – December 31, 1981 (Deficit)			$(48,186.45)

Note 2. Excess Distribution from Joint Venture (Continued)

RESULTS OF OPERATIONS

Income	$ 1,039.65
Costs and operating expenses	24,722.05
NET LOSS	$23,682.40

Distribution of net loss:

Concrete Pipe & Products Co., Inc. of California	$14,209.44
Hydro Conduit Corporation	9,472.96
TOTAL	$23,682.40

At December 31, 1981, Concrete Pipe had a receivable from the joint venture of $8,128.07 and a payable to the joint venture of $64,116.96.

Note 3. Related Parties and Related Party Transactions

The Company was a wholly owned subsidiary of Concrete Pipe and Products Company, Inc., until March 2, 1981, at which time, Stanley R. Navas purchased 51% interest in the Company. On December 31, 1981, this interest was repurchased by Concrete Pipe & Products Company, Inc.

The parent company from time to time made noninterest bearing advances to the Corporation which amounted to $2,727,492.42 at December 31, 1981. The Company's parent also owns a 49% interest in Navas Pipe Supply Company. During the year, Company sales to Navas Pipe Supply Company were $2,846,680.89. Accounts receivable from Navas Pipe Supply at December 31, 1981, amounted to $44,426.07 and accounts payable amounted to $2,016.00. In addition, the Company received $79,350.92 for administrative and other services furnished to Navas Pipe Supply.

Note 4. Income Taxes

The Company's operations for the two months ended February 28, 1981, are included in the consolidated Federal income tax return with its parent, Concrete Pipe & Products Company,

Inc. The amount of Federal income tax reduction allocated to the Company was based on the Company's net loss and tax credits for this two-month period. Operations for the ten months ended December 31, 1981, are reported on a separate Federal income tax return. The net loss of $542,277.68 and unused investment credit of $2,819.30 reported on this return will be carried forward and offset against this Company's future Federal taxable income and tax liabilities, respectively. Both the net loss and unused credit expire in 1996.

At the date of this report, consolidated Federal income tax returns through 1979 have been examined by the Internal Revenue Service and all know [sic] adjustments have been recorded.

Note 5. Pension Plan

Concrete Pipe & Products Company, Inc., and its subsidiaries have adopted an employee retirement plan covering substantially all of their employees. The plan was effective for the parent Company and Southern Brick & Supply Co., Incorporated, as of January 1, 1970, for Concrete Pipe & Products Co., Inc. of Manassas December 6, 1973, and for this Company January 1, 1977. The Company's policy is to fund the total of (a) currently accruing pension costs and (b) an amount equal to the amortization of past service costs over periods not exceeding 30 years. The total contribution to the pension plan for 1981 was $574,981.00 with this Company's share amounting to $56,698.00. The accumulated plan benefits and plan net assets as of January 1, 1981, for the retirement plan of Concrete Pipe & Products Company, Inc., and subsidiaries are presented below:

Actuarial present value of accumulated plan benefits:

Vested	$1,488,477.00
Nonvested	241,266.00
	$1,729,743.00
Net assets available for benefits	$3,124,133.34

The assumed rate of return used in determining the actuarial present value of accumulated plan benefits was 9%.

Note 6. Leases and Lease Commitments

The Company leases land at its Shafter and Sacramento plants.

The lease at Shafter expires on September 30, 1982. Rentals are paid quarterly in advance and the Company is to reimburse the lessor for property taxes.

The Sacramento lease is for a ten-year period, which started in 1979, with an option to renew for two consecutive renewal terms of five years each. The annual rental is $8,400.00. The Company is to pay all property taxes and is to maintain public liability insurance on the leased property.

In 1980, the Company entered into a lease agreement with BT Leasing Services, Inc., for machinery and improvements. The lease will be for fifteen years with no option to purchase. In accordance with Financial Accounting Standards Board Statement No. 13 – Accounting for Leases, this lease will be classified as an operating lease. Under the terms of the lease agreement, the Company is responsible for maintaining the equipment in good operating condition. In addition, the Company is liable

for all taxes on the equipment and improvements as well as maintaining proper insurance coverage. The lessor has agreed to pass through all investment tax credit available on the equipment to the Company.

Note 6. Leases and Lease Commitments (Continued)

Minimum rental commitments under all noncancellable leases are as follows:

	REAL ESTATE	MACHINERY	TOTAL
1982	$ 102,157.56	$ 332,260.80	$ 434,418.36
1983	$ 102,157.56	$ 332,260.80	$ 434,418.36
1984	$ 102,157.56	$ 332,260.80	$ 434,418.36
1985	$ 102,157.56	$ 332,260.80	$ 434,418.36
1986	$ 102,157.56	$ 332,260.80	$ 434,418.36
There after	829,365.52	2,852,450.33	3,681,815.85
	$1,340,153.32	$4,513,754.33	$5,853,907.65

Total rental expense for 1981 was as follows:

Real estate	$114,823.64
Automobiles and trucks	4,640.39
Machinery and equipment	332,260.80
	$451,724.83

Note 7. Contingent Liabilities

The Company was defendant in several actions arising in the normal course of business. Management is of the opinion that either adequate provision has been made for any loss or that the Company has sufficient insurance coverage.

MITCHELL, WIGGINS & COMPANY
CERTIFIED PUBLIC ACCOUNTANTS
411 ROSS BUILDING
P.O. BOX 1580
RICHMOND, VIRGINIA 23213
648-7211 AREA CODE 804

The Officers and Directors
Concrete Pipe & Products
Co., Inc. of California
Lockeford, California

The accompanying additional financial information is presented for supplementary analysis purposes and is not considered necessary for a fair presentation of the basic financial statements. The supplementary financial information has been subjected to the applicable audit procedures we performed in our examination of the related basic financial statements.

In our opinion, the supplementary financial information is fairly stated in all material respects in relation to the financial statements taken as a whole.

/s/ Mitchell, Wiggins &
Company
Certified Public Accountants

February 22, 1982

SUPPLEMENTARY DATA

STATEMENT OF INCOME – BY PLANTS

Year Ended December 31, 1981

	LOCKEFORD	SHAFTER	SACRA-MENTO	FLORIN	RECLASSI-FICATIONS AND ELIMINA-TIONS	TOTAL
GROSS SALES						
Concrete pipe and products	$ –	$ 32,726.13	$3,693,034.33	$1,503,340.93	$ –	$5,229,101.39
Freight charges	–	1,345.01	285,383.19	116,500.62	–	403,228.82
Shop	567,808.90	–	–	–	–	567,808.90
Interplant	447,945.08	–	–	–	(447,945.08)	–
Intercompany	379,715.11	–	–	–	–	379,715.11
TOTALS	$1,395,469.09	$ 34,071.14	$3,978,417.52	$1,619,841.55	$(447,945.08)	$6,579,854.22
Deduct – Delivery costs	–	3,072.72	329,907.86	134,719.14	–	467,699.72
NET SALES	$1,395,469.09	$ 30,998.42	$3,648,509.66	$1,485,122.41	$(447,945.08)	$6,112,154.50
COST OF PRODUCTS SOLD	1,395,561.39	214,237.16	3,552,402.95	1,465,784.20	(447,945.08)	6,180,040.62
GROSS PROFIT (LOSS) ON SALES	$ (92.30)	$(183,238.74)	$ 96,106.71	$ 19,338.21	$ –	$ (67,886.12
OPERATING EXPENSES						
Administrative	$ 73,999.21	$ 14,799.83	$ 103,980.18	$ 104,948.84	$ –	$ 297,728.06
Selling	50,775.12	29,909.93	133,836.93	73,490.33	–	288,012.31
Engineering	88,402.37	–	20,079.67	20,079.62	–	128,561.66
TOTAL	$ 213,176.70	$ 44,709.76	$ 257,896.78	$ 198,518.79	$ –	$ 714,302.03
LOSS FROM OPERATIONS	$ 213,269.00	$ 227,948.50	$ 161,790.07	$ 179,180.58	$ –	$ 782,188.15

STATEMENT OF INCOME - BY PLANTS

Year Ended December 31, 1981

(Continued)

	LOCKEFORD	SHAFTER	SACRA-MENTO	FLORIN	RECLASSI-FICATIONS AND ELIMINA-TIONS	TOTAL
OTHER INCOME						
Gain on disposal of property and equipment	$ -	$ -	$ -	$ 999.21	$ -	$ 999.21
Discounts earned	318.97	-	11,119.12	2,125.17	$ -	13,563.26
Royalties	13,945.29	$ -	-	11,736.47	-	25,681.76
Miscellaneous	678.43	10,526.13	56,485.01	35,822.56	-	103,512.13
TOTAL OTHER INCOME	$ 14,942.69	$ 10,526.13	$ 67,604.13	$ 50,683.41	$ -	$ 143,756.36
LOSS BEFORE OTHER DEDUCTION	$ 198,326.31	$ 217,422.37	$ 94,185.94	$ 128,497.17	$ -	$ 638,431.79
OTHER DEDUCTION						
Loss from join venture	-	-	-	-	14,209.44	14,209.44
LOSS BEFORE INCOME TAXES	$ 198,326.31	$ 217,422.37	$ 94,185.94	$ 128,497.17	$ 14,209.44	$ 652,641.23
REDUCTION OF INCOME TAXES						48,428.41
NET LOSS						$ 604,212.82

COST OF PRODUCTS MANUFACTURED AND SOLD

Year Ended December 31, 1981

	LOCKEFORD	SHAFTER	SACRAMENTO	FLORIN	ELIMINATIONS AND ADJUSTMENTS	TOTAL
RAW MATERIALS USED						
Cement	$ –	$ 8,165.29	$ 560,288.95	$110,087.18	$ –	$ 678,541.42
Sand and gravel	–	2,888.58	305,199.58	53,833.17	–	361,921.33
Reinforcing bars and hot rods	–	23,975.28	543,426.51	132,824.04	–	700,225.83
Miscellaneous steel	–	2,543.17	5,953.95	75.83	–	8,572.95
Welding rods	11,690.51	–	4,163.30	248.50	–	16,102.31
Gaskets and materials	–	911.52	58,720.55	8,459.50	–	68,091.57
Miscellaneous materials	–	1,953.07	19,853.57	2,714.92	–	24,521.56
Shop materials	567,123.97	–	–	–	–	567,123.97
Purchased components	23,268.87	–	–	–	–	23,268.87
TOTALS	$ 602,083.35	$ 40,436.91	$1,497,606.41	$308,243.14	$ –	$2,448,369.81
LABOR	$ 453,649.86	$ 26,911.30	$ 888,323.68	$171,911.35	$ –	$1,540,796.19
MANUFACTURING EXPENSES						
Power	$ 36,673.00	$ 4,108.54	$ 18,046.00	$ 18,395.16	$ –	$ 77,222.70
Gas, oil and grease	8,872.07	5,248.22	40,613.07	23,481.75	–	78,215.11
Repairs and maintenance	23,324.89	754.82	–	11,122.45	–	35,202.16
Rent expense	12.60	12,650.21	298,311.65	136,126.36	–	447,100.82
Miscellaneous manufacturing expense	34,656.34	27,880.12	493,421.43	86,259.47	–	642,217.36
Payroll taxes	36,032.00	2,698.00	76,343.73	16,125.16	–	131,198.89
TOTALS	$ 139,570.90	$ 53,339.91	$ 926,735.88	$291,510.35	$ –	$1,411,157.04
MANUFACTURING COST FOR INVENTORY VALUATION	$1,195,304.11	$120,688.12	$3,312,665.97	$771,664.84	$ –	$5,400,323.04

COST OF PRODUCTS MANUFACTURED AND SOLD

(Continued)

	LOCKEFORD	SHAFTER	SACRAMENTO	FLORIN	ELIMINATIONS AND ADJUSTMENTS	TOTAL
FACTORY ADMINISTRATIVE EXPENSES						
Supervisory and factory office salaries	$ 46,846.80	$ 612.00	$ 72,230.29	$ 39,759.68	–	$ 159,448.77
Travel and auto expense	7,588.40	3,365.71	11,447.05	10,036.10	–	32,437.26
Taxes:						
Land and buildings	6,750.03	217.60	4,261.70	7,902.90	$ –	19,132.23
Machinery and equipment	1,178.43	14,797.71	23,831.37	23,396.61	–	63,204.12
Payroll	3,512.00	53.00	5,135.00	2,955.00	–	11,655.00
Depreciation:						
Factory buildings	13,301.17	–	2,641.40	6,734.53	–	22,677.10
Machinery and equipment	32,129.37	59,729.98	263,297.57	209,801.38	–	564,958.30
Autos and trucks	1,176.83	–	2,116.68	700.00	–	3,993.51
Furniture and equipment	1,608.30	423.50	1,347.40	3,811.32	–	7,190.52
Amortization of leasehold improvements	–	2,503.07	–	–	–	2,503.07
Insurance	47,089.62	3,216.32	108,051.58	9,444.03	–	167,801.55
Contribution to employees' pension plan	20,978.00	–	17,374.65	7,138.88	–	45,491.53
Miscellaneous manufacturing expense	14,244.88	10,437.30	24,457.27	30,785.51	–	79,924.96
Recovery of factory administrative expense	–	–	–	–	–	–
TOTALS	$ 196,403.83	$ 95,356.19	$ 536,191.96	$ 352,465.94	$ –	$1,180,417.92

COST OF PRODUCTS MANUFACTURED AND SOLD

(Continued)

	LOCKEFORD	SHAFTER	SACRAMENTO	FLORIN	ELIMINATIONS AND ADJUSTMENTS	TOTAL
TOTAL MANUFACTURING COST	$1,391,707.94	$216,044.31	$3,848,857.93	$1,124,130.78	$ –	$6,580,740.96
Add: Finish products inventory – January 1, 1981	55,462.19	27,079.47	522,848.66	563,176.94	–	1,168,567.26
Purchases for resale	–	–	2,016.00	–	–	2,016.00
Transfers from other divisions	–	112,614.59	24,961.36	18,701.20	(156,277.15)	–
TOTALS	$1,447,170.13	$355,738.37	$4,398,683.95	$1,706,008.92	$(156,277.15)	$7,751,324.22
Deduct: Finish products inventory – December 31, 1981	51,608.74	141,501.21	846,281.00	240,224.72	–	1,279,615.67
Products used in construction and repairs	–	–	–	–	(291,667.93)	291,667.93
COST OF PRODUCTS SOLD	$1,395,561.39	$214,237.16	$3,552,402.95	$1,465,784.20	$(447,945.08)	$6,180,040.62

SCHEDULE OF OPERATING EXPENSES

Year Ended December 31, 1981

	ADMINISTRATIVE	SELLING	ENGINEERING	TOTAL
Salaries	$152,423.84	$189,754.58	$ 98,640.19	$440,818.61
Travel and auto expense	17,346.79	35,081.90	2,944.64	55,373.33
Insurance	11,234.06	10,360.02	6,551.41	28,145.49
Telephone	3,884.93	–	–	3,884.93
Dues and subscription	1,060.70	–	–	1,060.70
Supplies	3,294.66	–	–	3,294.66
Depreciation: Office building	4,404.45	–	–	4,404.45
Automobiles	1,930.58	6,669.65	2,552.56	11,152.79
Furniture and equipment	9,175.66	–	–	9,175.66
Amortization: Goodwill	6,023.29	–	–	6,023.29
Organization expense	193.52	–	–	193.52
Patents	1,058.15	–	–	1,058.15
Postage	2,031.75	–	–	2,031.75
Data processing services	5,685.29	–	–	5,685.29
Repairs and maintenance	3,530.11	–	–	3,530.11
Rent and utilities	4,999.63	–	–	4,999.63
Contribution to employees' pension plan	7,370.00	10,206.00	4,536.00	22,112.00
Taxes and licenses	200.00	–	–	200.00
Payroll taxes	9,210.57	14,671.00	7,910.00	31,791.57
Miscellaneous	17,039.96	21,269.16	5,426.86	43,735.98
Professional fees	31,761.90	–	–	31,761.90
Contributions	878.00	–	–	878.00
Uncollectible accounts	2,990.22	–	–	2,990.22
	$297,728.06	$288,012.31	$128,561.66	$714,302.03

EXHIBIT E-2

CONCRETE PIPE & PRODUCTS CO., INC.,
OF CALIFORNIA

FINANCIAL REPORT

December 31, 1982

OFFICERS

Stanley R. Navas, President

William H. Street, III, Executive Vice-President

Raymond E. Miles, Secretary-Treasurer

Benjamin M. Ehrhardt, Assistant Secretary-Treasurer

DIRECTORS

Stanley R. Navas William H. Street, III

Raymond E. Miles

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MITCHELL, WIGGINS & COMPANY
CERTIFIED PUBLIC ACCOUNTS
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P.O. BOX 1580
RICHMOND, VIRGINIA 23213
648-7211 AREA CODE 804

The Officers and Directors
Concrete Pipe & Products
Co., Inc., of California
Lockeford, California

We have examined the accompanying Balance Sheet of Concrete Pipe & Products Co., Inc., of California, a wholly owned subsidiary of Concrete Pipe & Products Company, Inc., as of December 31, 1982, and the related Statements of Income, Retained Earnings and Changes in Financial Position for the year then ended. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the financial statements mentioned above present fairly the financial position of Concrete Pipe & Products Co., Inc., of California at December 31, 1982, and the results of its operations and the changes in its financial position for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

February 14, 1983 /s/ Mitchell, Wiggins
& Company
Certified Public Accountants

FINANCIAL STATEMENTS

BALANCE SHEET

December 31, 1982

ASSETS

CURRENT ASSETS		
Cash on hand and on deposit		$ 121,341.93
Accounts receivable:		
Trade	$975,675.71	
Navas Pipe Supply Company (Note 3)	2,987.75	
Employees and other	14,063.10	
		992,726.56
Inventories:		
Finished products	$797,535.38	
Work-in-process	27,910.62	
Raw materials	336,257.95	
Factory supplies	10,047.69	
		1,171,751.64
Prepaid expenses		21,756.60
TOTAL CURRENT ASSETS		$2,307,576.73

DEPOSITS				
Miscellaneous deposits				$ 10,275.00
PROPERTY AND EQUIPMENT	COST	ACCUMULATED DEPRECIATION	NET	
Land	$ 181,752.78	$ –	$ 181,752.78	
Buildings	405,851.61	147,320.67	258,530.94	
Machinery and equipment	3,394,564.39	2,700,250.27	694,314.12	
Automobiles and trucks	161,750.13	99,777.23	61,972.90	
Office furniture and fixtures	69,992.12	52,037.68	17,954.44	
Leasehold improvements	13,653.02	13,653.02	–	
	$4,227,564.05	$3,013,038.87	$1,214,525.18	1,214,525.18
INTANGIBLES (Net of amortization)				
Goodwill			$ 53,708.57	
Patents			1,592.44	55,301.01
				$3,587,677.92

The Notes to Financial Statements are an integral part of this statement.

LIABILITIES AND STOCKHOLDER'S EQUITY

CURRENT LIABILITIES		
Accounts payable:		
Trade	$ 118,180.63	
CVR-CP&P/Hydro Conduit – Joint venture (Note 2)	64,116.96	
Concrete Pipe & Products Company, Inc., Parent (Note 3)	2,815,594.24	$2,997,891.83
Payroll taxes deducted and accrued		3,232.18
Accrued pension plan contribution (Note 5)		45,543.00
Sales tax payable		13,460.16
Accrued salaries and wages		11,597.60
Accrued workmen's compensation insurance		40,838.00
Other items accrued or payable		7,427.56
TOTAL CURRENT LIABILITIES		$3,119,990.33

DEFERRED LIABILITIES		
Excess distribution from joint venture (Note 2)		50,031.01
STOCKHOLDER'S EQUITY		
Common stock – Par value $1.00 per share; Authorized 5,000,000 shares; Issued and outstanding 300,000 shares	$ 300,000.00	
Retained earnings	117,656.58	417,656.58
		$3,587,677.92

STATEMENT OF INCOME

Year Ended December 31, 1982

GROSS SALES		
Concrete pipe and products		$5,501,828.57
Freight charges		443,155.17
Shop		957,902.12
TOTAL		$6,902,885.86
Deduct – Delivery costs		580,508.55
NET SALES		$6,322,377.31
COST OF PRODUCTS SOLD		6,665,711.39
GROSS LOSS ON SALES		$ 343,334.08
OPERATING EXPENSES		
Administrative	$404,064.31	
Selling	278,866.27	
Engineering	114,983.14	797,913.72
LOSS FROM OPERATIONS		$1,141,247.80

OTHER INCOME		
Discounts earned	$ 10,944.32	
Royalties	23,476.46	
Miscellaneous	37,177.41	71,598.19
TOTAL		$1,069,649.61
OTHER DEDUCTION		
Loss from joint venture		1,844.56
LOSS BEFORE INCOME TAXES		$1,071,494.17
PROVISION FOR INCOME TAXES (Note 4)		
Reduction of income tax based on California loss		506,086.18
NET LOSS		$ 565,407.99

The Notes to Financial Statements are an integral part of this statement.

STATEMENT OF RETAINED EARNINGS

Year Ended December 31, 1982

BALANCE - January 1, 1982	$683,064.57
Deduct - Net loss	565,407.99
BALANCE - December 31, 1982	$117,656.58

The Notes to Financial Statements are an integral part of this statement.

STATEMENT OF CHANGES IN FINANCIAL POSITION

Year Ended December 31, 1982

FINANCIAL RESOURCES APPLIED TO	
Operations:	
Net loss	$(565,407.99)
Items which did not require outlay of working capital during the year:	
Depreciation	$17,676.33
Amortization	6,383.83
Loss from joint venture	1,844.56
WORKING CAPITAL APPLIED TO OPERATIONS	$ 39,503.27
Deposits	275.00
Acquisition of property and equipment:	
Machinery and equipment	126,062.32
Automobiles and trucks	29,363.30
Office furniture and fixtures	5,486.76
Buildings	92,615.00
TOTAL FINANCIAL RESOURCES APPLIED	$ 293,305.65
DECREASE IN WORKING CAPITAL	$ 293,305.65

SUMMARY OF CHANGES IN WORKING CAPITAL COMPONENTS

Increase (decrease) in current assets:	
Cash	$ 32,984.53
Accounts receivable	458,690.93
Inventories	(880,167.68)
Prepaid expenses	2,446.10
	$(386,046.12)
Increase (decrease) in current liabilities:	
Accounts payable	$ (63,926.90)
Accrued salaries and wages	(1,608.90)
Sales tax payable	(760.75)
Accrued workmen's compensation insurance	(10,948.70)
Accrued pension plan contribution	(11,155.00)
Other items accrued or payable	(4,340.22)
	$ (92,740.47)
DECREASE IN WORKING CAPITAL	$ 293,305.65

The Notes to Financial Statements are an integral part of this statement.

NOTES TO FINANCIAL STATEMENTS

December 31, 1982

Note 1. Summary of Significant Accounting Policies

The Company uses the direct charge-off method of accounting for bad debts. At the end of the year, the receivables are reviewed and all of the accounts which are considered uncollectible are charged off to expense.

Inventories are generally stated at the lower of cost (first-in, first-out method) or market. Market is considered as the net realizable value.

Property and equipment are carried at cost. Major additions and betterments are charged to property accounts while replacements, maintenance, and repairs which do not improve or extend the life of the respective assets are expensed currently. Property and equipment purchased after December 31, 1980, are depreciated using the Accelerated Cost Recovery System as described in the Economic Recovery Tax Act of 1981. For property and equipment purchased prior to January 1, 1981, depreciation is computed using accelerated methods for substantially all new assets, while depreciation is computed using the straight-line method for used assets. These depreciation methods are used for both financial reporting and income tax purposes.

The investment in the joint venture is being accounted for by the equity method. Under the equity method the investment is carried at cost adjusted for the Company's share of the net income or loss of the investee subsequent to acquisition.

Goodwill is being amortized over fifteen years by the straight-line method. Patents are being amortized over their respective remaining lives.

Note 2. Excess Distribution from Joint Venture

Concrete Pipe & Products Co., Inc., of California has a 60% interest in a joint venture doing business under the name of CVR-CP&P/Hydro Conduit. This joint venture was formed to produce so much of the concrete pipe required by the Sacramento Regional County Sanitation District as the joint venture was the successful bidder. As of December 31, 1982, the joint venture had produced and delivered all of the pipe required for the project. However, the joint venture remains in existence pending settlement of certain legal matters.

As mentioned in Note 1, the joint venture has been accounted for on the equity method. The changes in the investment account are summarized below:

Balance – January 1, 1982 (Deficit)	$(48,186.45)
Deduct – Share of loss	1,844.56
Balance – December 31, 1982 (Deficit)	$(50,031.01)

RESULTS OF OPERATIONS

Income	$ –
Costs and operating expenses	3,074.27
NET LOSS	$3,074.27

Distribution of net loss:

Concrete Pipe & Products Co., Inc., of California	$1,844.56
Hydro Conduit Corporation	1,229.71
TOTAL	$3,074.27

At December 31, 1982, Concrete Pipe had a receivable from the joint venture of $11,177.53 and a payable to the joint venture of $64,116.96.

Note 3. Related Parties and Related Party Transactions

The Company is a wholly owned subsidiary of Concrete Pipe and Products Company, Inc. The parent company from time to time made noninterest bearing advances to the Corporation which amounted to $2,815,594.24 at December 31, 1982. The Company's parent also owns a 49% interest in Navas Pipe Supply Company. During the year, Company sales to Navas Pipe Supply Company were $2,080,751.43. Accounts receivable from Navas Pipe Supply at December 31, 1982, amounted to $2,987.75 and accounts payable amounted to $267.12. In addition, the Company received $8,467.37 for administrative and other services furnished to Navas Pipe Supply.

Note 4. Income Taxes

At the date of this report, consolidated Federal income tax returns through 1979 have been examined by the Internal Revenue Service and all known adjustments have been recorded.

Note 5. Pension Plan

Concrete Pipe & Products Company, Inc., and its subsidiaries have adopted an employee retirement plan covering substantially all of their employees. The plan was effective for the parent Company and Southern Brick & Supply Co., Incorporated, as of January 1, 1970, for Concrete Pipe & Products Co., Inc. of Manassas December 6, 1973, and for this Company January 1, 1977. The Company's policy is to fund the total of (a)

currently accruing pension costs and (b) an amount equal to the amortization of past service costs over periods not exceeding 30 years. The total contribution to the pension plan for 1982 was $554,930.00 with this Company's share amounting to $45,543.00. The accumulated plan benefits and plan net assets as of January 1, 1982, for the retirement plan of Concrete Pipe & Products Company, Inc., and subsidiaries are presented below:

Actuarial present value of accumulated plan benefits:

Vested	$1,694,582.00
Nonvested	243,322.00
	$1,937,904.00
Net assets available for benefits	$3,694,517.03

The assumed rate of return used in determining the actuarial present value of accumulated plan benefits was 9.75%.

Note 6. Leases and Lease Commitments

The Company leases land at its Shafter and Sacramento plants.

The lease at Shafter expires on September 30, 1983. Rentals are paid quarterly in advance and the Company is to reimburse the lessor for property taxes. The annual rental is $17,985.00.

The Sacramento lease is for a ten-year period, which started in 1979, with an option to renew for two consectutive [sic] renewal terms of five years each. The annual rental is $8,400.00. The Company is to pay all property taxes and is to maintain public liability insurance on the leased property.

In 1980, the Company entered into a lease agreement with BT Leasing Services, Inc., for machinery and improvements. The lease will be for

fifteen years with no option to purchase. In accordance with Financial Accounting Standards Board Statement No. 13 - Accounting for Leases, this lease will be classified as an operating lease. Under the terms of the lease agreement, the Company is responsible for maintaining the equipment in good operating condition. In addition, the Company is liable for all taxes on the equipment and improvements as well as maintaining proper insurance coverage. The lessor has agreed to pass through all investment tax credit available on the equipment to the Company.

Minimum rental commitments under all non-cancellable leases are as follows:

	REAL ESTATE	MACHINERY	TOTAL
1983	$ 102,157.56	$ 332,260.80	$ 434,418.36
1984	$ 102,157.56	$ 332,260.80	$ 434,418.36
1985	$ 102,157.56	$ 332,260.80	$ 434,418.36
1986	$ 102,157.56	$ 332,260.80	$ 434,418.36
1987	$ 102,157.56	$ 332,260.80	$ 434,418.36
Thereafter	735,607.96	2,520,189.53	3,255,797.49
	$1,246,395.76	$4,181,493.53	$5,427,889.29

Total rental expense for 1982 was as follows:

Real Estate	$120,142.56
Machinery and equipment	332,335.65
	$452,478.21

Note 7. Contingent Liabilities

The California Construction Laborers Union has instituted suit seeking to recover not less than $268,168.81, plus liquidated damages and counsel fees. The suit results from a withdrawal penalty which the union has asserted against the

Company. Management is of the opinion that the Company is not liable.

In addition, the Company was defendant in several actions arising in the normal course of business. Management is of the opinion that either adequate provision has been made for any loss or that the Company has sufficient insurance coverage.

MITCHELL, WIGGINS & COMPANY
CERTIFIED PUBLIC ACCOUNTANTS
411 Ross Building
P.O. Box 1580
Richmond, Virginia 23213
648-7211 area code 804

The Officers and Directors
Concrete Pipe & Products Co.,
Inc., of California
Lockeford, California

The accompanying additional financial information is presented for supplementary analysis purposes and is not considered necessary for a fair presentation of the basic financial statements. The supplementary financial information has been subjected to the applicable audit procedures we performed in our examination of the related basic financial statements.

In our opinion, the supplementary financial information is fairly stated in all material respects in relation to the financial statements taken as a whole.

/s/ Mitchell, Wiggins
& Company
Certified Public Accountants

February 14, 1983

SUPPLEMENTARY DATA

STATEMENT OF INCOME – BY PLANTS

Year Ended December 31, 1982

	LOCKEFORD	SHAFTER	SACRA-MENTO	FLORIN	RECLASSI-FICATIONS AND ELIMINA-TIONS	TOTAL
GROSS SALES						
Concrete pipe and products	$ –	$ 958,501.03	$ 2,192,538.98	$ 2,260,735.28	$ –	$ 5,411,775.29
Freight charges	–	13,158.69	200,302.23	229,694.25	–	443,155.17
Shop	992,968.64	–	–	–	–	992,968.64
Interplant	350,414.71	–	–	–	(350,414.71)	–
Intercompany	54,986.76	–	–	–	–	54,986.76
TOTALS	$ 1,398,370.11	$ 971,659.72	$ 2,392,841.21	$ 2,490,429.53	$ (350,414.71)	$ 6,902,885.86
Deduct – Delivery costs	–	47,190.33	258,776.09	274,542.13	–	580,508.55
NET SALES	$ 1,398,370.11	$ 924,469.39	$ 2,134,065.12	$ 2,215,887.40	$ (350,414.71)	$ 6,322,377.31
COST OF PRODUCTS SOLD	1,115,947.18	1,073,764.76	2,484,749.87	2,341,664.29	(350,414.71)	6,665,711.39
GROSS PROFIT (LOSS) ON SALES	$ 282,422.93	$ (149,295.37)	$ (350,684.75)	$ (125,776.89)	$ –	$ (343,334.08)
OPERATING EXPENSES						
Administrative	$ 100,583.27	$ 20,116.62	$ 141,197.87	$ 142,166.55	$ –	$ 404,064.31
Selling	57,621.85	31,551.68	121,634.38	68,058.36	–	278,866.27
Engineering	91,649.85	–	11,666.68	11,666.61	–	114,983.14
TOTAL	$ 249,854.97	$ 51,668.30	$ 274,498.93	$ 221,891.52	$ –	$ 797,913.72
INCOME (LOSS) FROM OPERATIONS	$ 32,567.96	$ (200,963.67)	$ (625,183.68)	$ (347,668.41)	$ –	$ (1,141,247.80)
OTHER INCOME						
Discounts earned	$ 214.77	$ 1,369.17	$ 4,731.09	$ 4,629.29	$ –	$ 10,944.32
Royalties	10,256.28	–	–	13,220.18	–	23,476.46
Miscellaneous	11,134.06	16,966.72	7,421.40	1,655.23	–	37,177.41
TOTAL OTHER INCOME (Forward)	$ 21,605.11	$ 18,335.89	$ 12,152.49	$ 19,504.70	$ –	$ 71,598.19

STATEMENT OF INCOME – BY PLANTS

(Continued)

	LOCKEFORD	SHAFTER	SACRA-MENTO	FLORIN	RECLASSI-FICATIONS AND ELIMINA-TIONS	TOTAL
TOTAL OTHER INCOME (Forwarded)	$ 21,605.11	$ 18,335.89	$ 12,152.49	$ 19,504.70	$ –	$ 71,598.19
INCOME (LOSS) BEFORE OTHER DEDUCTION	$ 54,173.07	$ (182,627.78)	$ (613,031.19)	$ (328,163.71)	$ –	$ (1,069,649.61)
OTHER DEDUCTION						
Loss from joint venture	–	–	–	–	1,844.56	1,844.56
INCOME (LOSS) BEFORE INCOME TAXES	$ 54,173.07	$ (182,627.78)	$ (613,031.19)	$ (328,163.71)	$ (1,844.56)	$ (1,071,494.17)
REDUCTION OF INCOME TAXES						506,086.18
NET LOSS						$ (565,407.99)

COST OF PRODUCTS MANUFACTURED AND SOLD

Year Ended December 31, 1982

	LOCKEFORD	SHAFTER	SACRA-MENTO	FLORIN	ELIMINA-TIONS AND ADJUST-MENTS	TOTAL
RAW MATERIALS USED						
Cement	$ –	$ 91,570.99	$ 163,859.95	$ 204,811.91	$ –	$ 460,242.85
Sand and gravel	–	36,313.73	103,222.18	99,682.73	–	239,218.64
Rinforcing bars and hot rods	–	107,540.50	269,042.46	278,898.61	–	655,481.57
Miscellaneous steel	–	–	1,924.23	4,935.94	–	6,860.17
Welding rods	7,985.24	903.00	1,574.60	1,082.68	–	11,545.52
Gaskets and materials	–	18,668.50	28,618.61	32,112.02	–	79,399.13
Miscellaneous materials	–	2,340.90	11,252.47	18,365.95	–	31,959.32
Shop materials	488,243.79	–	–	–	–	488,243.79
Purchased components	26,566.38	–	–	–	–	26,566.38
TOTALS	$ 522,795.41	$ 257,337.62	$ 579,494.50	$ 639,889.84	$ –	$ 1,999,517.37
LABOR	$ 319,064.05	$ 232,937.39	$ 507,409.95	$ 411,960.78	$ –	$ 1,471,372.17
MANUFACTURING EXPENSES						
Power	$ 43,691.03	$ 39,043.24	$ 26,074.93	$ 28,390.48	$ –	$ 137,199.68
Gas, oil and grease	5,829.96	25,652.72	29,847.44	41,663.40	–	102,993.52
Repairs and maintenance	23,019.17	4,112.84	1,983.04	1,467.99	–	30,583.04
Rent expense	30.24	17,985.00	257,796.45	176,666.52	–	452,478.21
Miscellaneous manufacturing expense	34,551.86	185,788.77	343,137.11	311,585.69	–	875,063.43
Payroll taxes	26,106.00	19,843.46	45,805.55	41,478.66	–	133,233.67
TOTAL	$ 133,228.26	$ 292,426.03	$ 704,644.52	$ 601,252.74	$ –	$ 1,731,551.55
MANUFACTURING COST FOR INVENTORY VALUATION (Forward)	$ 975,087.72	$ 782,701.04	$ 1,791,548.97	$ 1,653,103.36	$ –	$ 5,202,441.09

COST OF PRODUCTS MANUFACTURED AND SOLD

(Continued)

	LOCKEFORD	SHAFTER	SACRA-MENTO	FLORIN	ELIMINA-TIONS AND ADJUST-MENTS	TOTAL
MANUFACTURING COST FOR INVENTORY VALUATION (Forwarded)	$ 975,087.72	$ 782,701.04	$ 1,791,548.97	$ 1,653,103.36	$ –	$ 5,202,441.09
FACTORY ADMINISTRATIVE EXPENSES						
Supervisory and factory office salaries	$ 49,203.37	$ 10,103.43	$ 75,911.12	$ 34,300.08	$ –	$ 169,518.00
Travel and auto expense	11,159.79	47,222.29	15,417.27	17,629.61	–	91,428.96
Taxes:						
Land and buildings	6,921.33	723.15	3,848.55	7,857.78	–	19,350.81
Machinery and equipment	1,681.88	(2,085.46)	35,664.12	28,234.32	–	63,494.86
Payroll	3,817.00	1,137.00	5,529.00	2,467.00	–	12,950.00
Depreciation:						
Factory buildings	12,005.00	50,920.01	1,840.78	1,597.35	–	66,363.14
Machinery and equipment	26,349.87	–	185,622.30	176,289.46	–	388,261.63
Autos and trucks	1,221.03	–	3,919.43	1,934.39	–	7,074.85
Furniture and equipment	1,181.29	–	874.40	3,043.84	–	5,099.53
Insurance	7,475.30	24,810.38	(12,406.77)	52,352.06	–	72,230.97
Contribution to employees' pension plan	4,555.00	1,828.31	15,380.94	10,869.61	–	32,633.86
Miscellaneous manufacturing expense	10,200.48	37,376.18	23,389.04	39,325.83	–	110,291.53
TOTALS	$ 135,771.34	$ 172,035.29	$ 354,990.18	$ 375,901.33	$ –	$ 1,038,698.14
TOTAL MANUFACTURING COST	$ 1,110,859.06	$ 954,736.33	$ 2,146,539.15	$ 2,029,004.69	$ –	$ 6,241,139.23
Add: Finish products inventory – January 1, 1982	51,608.74	141,501.21	846,281.00	240,224.72	–	1,279,615.67
Purchases for resale	–	–	195.00	–	–	195.00
Transfers from other division	–	42,313.75	119,843.26	130,554.57	(292,711.58)	–
TOTALS	$ 1,162,467.80	$ 1,138,551.29	$ 3,112,858.41	$ 2,399,783.98	$ (292,711.58)	$ 7,520,949.90
Deduct: Finish products inventory – December 31, 1982	46,520.62	64,786.53	628,108.54	58,119.69	–	797,535.38
Products used in construction and repairs	–	–	–	–	57,703.13	57,703.13
COST OF PRODUCTS SOLD	$ 1,115,947.18	$ 1,073,764.76	$ 2,484,749.87	$ 2,341,664.29	$ (350,414.71)	$ 6,665,711.39

SCHEDULE OF OPERATING EXPENSES

Year Ended December 31, 1982

	ADMINISTRATIVE	SELLING	ENGINEERING	TOTAL
Salaries	$160,903.65	$158,850.24	$ 84,049.92	$403,803.81
Travel and auto expense	29,991.95	41,045.69	4,016.01	75,053.65
Insurance	12,274.82	10,299.49	9,275.62	31,849.93
Telephone	8,476.56	–	–	8,476.56
Dues and subscriptions	1,264.62	–	–	1,264.62
Supplies	4,758.43	–	–	4,758.43
Depreciation:				
Office building	4,404.45	5,556.90	–	9,961.35
Automobiles	3,156.04	13,121.48	–	16,277.52
Furniture and equipment	5,690.88	781.03	–	6,471.91
Amortization:				
Goodwill	6,023.39	–	–	6,023.39
Patents	360.44	–	–	360.44
Postage	2,090.90	–	–	2,090.90
Data processing services	5,084.29	–	–	5,084.29
Repairs and maintenance	641.56	–	–	641.56
Rent and utilities	6,401.27	–	–	6,401.27
Contribution to employees' pension plan	9,624.14	9,140.56	4,569.79	23,334.49
Taxes and licenses	200.00	–	–	200.00
Payroll taxes	10,189.86	13,562.00	6,801.00	30,552.86
Miscellaneous	16,042.98	26,508.88	6,270.80	48,822.66
Professional fees	62,445.01	–	–	62,445.01
Contributions	861.00	–	–	861.00
Uncollectible accounts	53,178.07	–	–	53,178.07
	$404,064.31	$278,866.27	$114,983.14	$797,913.72

	Initials	Date
Prepared By		
Approved By		

EXHIBIT E-3

Concrete Pipe & Products Co., Inc. of California

Balance Sheet

June 30, 1983

	Current Month	Prior Month	Change
ASSETS:			
Current Assets:			
Cash	98,309.37	81,041.27	17,268.10
Accounts Receivable	994,309.58	557,103.86	437,205.72
Inventories:			
Finished Products	1,072,451.84	1,167,654.61	<95,202.77 >
Shop Resale Items	47,036.86	46,886.67	150.19
Shop Work In Process	30,020.53	37,041.65	<7,021.12 >
Raw Materials – Plants	247,330.49	157,766.47	89,564.02
Raw Material – Shop	65,394.94	62,659.72	2,735.22
Factory Supplies	9,638.40	2,580.96	7,057.44
Total Inventories	1,471,873.06	1,474,590.08	<2,717.02 >
Prepaid Expenses	3,276.60	8,590.44	<5,313.84 >
Deposits	10,075.00	10,075.00	-0-
Investment in Joint Venture	<50,031.01 >	<50,031.01 >	-0-
Total Current Assets	2,527,812.60	2,081,369.64	446,442.96
Plant Assets:			
Land	181,752.78		
Factory Buildings	251,428.99		
Office Buildings	153,972.62	SAME	-0-
Machinery & Equipment	3,394,564.39		
Autos & Trucks	158,349.97		
Office Furn. & Equip.	71,161.07		
Leasehold Improvements	28,758.65		
Total	4,239,988.47	4,239,988.47	-0-
Less Accum. Depreciation	3,237,454.77	3,199,513.77	37,941.00
Net Plant Assets	1,002,533.70	1,040,474.70	<37,941.00 >
Intangibles:			
Goodwill	50,696.57	51,198.57	<502.00 >
Patents	1,382.44	1,417.44	<35.00 >
Organization Expense			
Total Assets	3,582,425.31	3,174,460.35	407,964.96

Concrete Pipe & Products Co., Inc. of California

Balance Sheet

June 30, 1983

	Current Month	Prior Month	Change
Liabilities & Capital:			
Current Liabilities:			
Accounts Payable – Trade	421,723.80	201,020.08	220,703.72
Accounts Payable CP & P	2,781,296.55	2,765,734.50	15,562.05
Other Liabilities	73,536.96	78,787.34	<5,250.38 >
Other Accruals:			
Income Taxes Payable	-0-	-0-	
Salaries & Wages	42,808.70	26,384.77	16,423.93
Payroll Taxes	12,241.59	13,943.53	<1,701.94 >
Employee Contributions	966.17	1,016.47	<50.30 >
Group Insurance	6,563.55	6,669.87	<106.32 >
Administrative Pensions	26,652.00	67,753.00	<41,101.00 >
Workers Compensation Ins.	56,399.00	53,610.00	2,789.00
Sales Tax	30,878.15	15,999.19	14,878.96
Property Taxes	-0-	<3,849.62 >	3,849.62
Total Current Liabilities	3,453,066.47	3,227,069.13	225,997.34
Capital:			
Capital Stock	300,000.00	300,000.00	-0-
Retained Earn. Prior Years	117,656.58	117,656.58	-0-
Retained Earn. Current Year	<288,297.74 >	<470,265.36 >	181,967.62
Total Capital	129,358.84	<52,608.78 >	181,967.62
Total Liabilities & Capital	3,582,425.31	3,174,460.35	407,964.96

Concrete Pipe & Products Co., Inc. of California

Consolidated Income Statement

June 1983

Pipe Plants:	Current Income & Exp.	Month % of Gross Sales	Year To Income & Exp.	Date % of Gross Sales
Gross Sales:				
Concrete Pipe & Products	715,530.62	100.00	1,571,821.97	100.00
Deduct:				
Delivery Costs	94,437.84	13.20	197,318.03	12.55
Net Sales	621,092.78	86.80	1,374,503.94	87.45
Cost of Products Sold	419,061.81	58.57	1,522,286.55	96.85
Gross Profit on Sales	202,030.97	28.23	<147,782.61 >	<9.40 >
Operating Expenses:				
Selling	19,341.19	2.70	122,564.04	7.80
Administrative	19,785.79	2.77	125,778.71	8.00
Engineering	1,659.46	.23	10,855.28	.69
Total Operating Expenses	40,786.44	5.70	259,198.03	16.49
Income From Operations	161,244.53	22.53	<406,980.64 >	<25.89 >
Other (Inc.) Exp.	<8,938.19 >	<1.25 >	<134,955.88 >	<8.59 >
Net Income – Pipe Plants	170,182.72	23.78	<272,024.76 >	<17.30 >
PARAFAB – Net Inc. (Loss)	11,784.90		<16,272.98 >	
Profit (Loss) From J.V.	-0-		-0-	
Income Before Taxes	181,967.62		<288,297.74 >	
Consolidated Gross Sales:				
Pipe Plants	715,530.62		1,571,821.97	
Parafab Engineering (*)	64,298.13		366,165.93	
Total	779,828.75		1,937,987.90	

(*) Does not include Inter-Plant Sales

INCOME STATEMENT

Plant: Parafab Eng. Month: June 1983

	Current Month	% of Gross Sales	Current Month	% of Gross Sales
Sales:				
Outside Sales:				
Shop	20,459.03	16.16	156,900.30	31.82
Resale Parts	3,424.85	2.70	18,032.48	3.66
Inter Company	40,414.25	31.92	191,233.15	38.77
Inter Plant:				
For Resale	59,002.90	46.59	98,152.49	19.90
Other	3,334.56	2.63	28,874.08	5.85
Total Sales	126,635.59	100.00	493,192.50	100.00
Cost of Goods Sold	80,419.59	63.50	322,860.71	65.46
Gross Profit	46,216.00	36.50	170,331.79	34.54
Factory Adm. Expense	15,988.57	12.63	84,776.75	17.19
Gross Profit On Sales	30,227.43	23.87	85,555.04	17.35
Operating Expenses:				
Selling	5,986.73	4.73	30,556.67	6.20
Administrative	6,546.92	5.17	41,680.07	8.45
Engineering	6,001.46	4.74	34,805.27	7.05
Total Oper. Exp.	18,535.11	14.64	107,042.01	21.70
Income From Operations	11,692.32	9.23	<21,486.97 >	4.35
Other Income:				
Discounts Earned	<2.58 >	-0-	<32.33 >	<.01 >
Royalties	-0-		<2,263.71 >	<.46 >
Misc. Inc.	<90.00 >	<.07 >	<2,917.95 >	<.59 >
Total Other Income	<92.58 >	<.07 >	<5,213.99 >	<1.06 >
Other Expenses				
Income Before Taxes	11,784.90	9.30	<16,272.98 >	<3.29 >

INCOME STATEMENT

Plant: Shafter Month: June 1983

	Current Income & Exp.	Month % of Gross Sales	Year To Date Income & Exp.	% of Gross Sales
Gross Sales:				
Concrete Pipe & Products	31,793.18	100.00	119,451.80	100.00
Deduct:				
Delivery Costs	3,658.23	11.51	11,556.71	9.67
Net Sales	28,134.95	88.49	107,895.09	90.33
Cost of Products Sold	32,734.01	102.96	147,861.89	123.78
Gross Profit on Sales	<4,599.06 >	<14.47 >	<39,966.80 >	<33.46 >
Operating Expenses:				
Selling	4,921.07		31,093.18	
Administrative	1,309.39		8,319.24	
Engineering	-0-		-0-	
Total Operating Expenses	6,230.46		39,412.42	
Income From Operations	<10,829.52 >		<79,379.22 >	
Other Income:				
Discounts Earned			<320.24 >	
Royalties				
Recovery on Bad Debts			<431.84 >	
Gain on Sale of Assets				
Misc. Income	<60.15 >		<4,134.85 >	
Total Other Income	<60.15 >		<4,886.93 >	
Other Deductions:				
Income Before Taxes	<10,769.37 >		<74,492.29 >	

INCOME STATEMENT

Plant: Jackson Road Month: June 1983

	Current Income & Exp.	Month % of Gross Sales	Year To Income & Exp.	Date % of Gross Sales
Gross Sales:				
Concrete Pipe & Products	637,612.64	100.00	1,221,095.17	100.00
Deduct:				
Delivery Costs	71,194.67	11.17	145,579.48	11.92
Net Sales	566,417.97	88.83	1,075,515.69	88.08
Cost of Products Sold	320,945.72	50.34	978,932.63	80.17
Gross Profit on Sales	245,472.25	38.49	96,583.06	7.91
Operating Expenses:				
Selling	8,160.38	1.28	51,594.65	4.23
Administrative	9,197.70	1.44	58,486.73	4.79
Engineering	829.73	.13	5,427.66	.44
Total Operating Expenses	18,187.81	2.85	115,509.04	9.46
Income From Operations	227,284.44	35.64	<18,925.98 >	<1.55 >
Other Income:				
Discounts Earned	<699.33 >	<.11 >	<3,754.09 >	<.30 >
Royalties				
Recovery on Bad Debts			<3,022.86 >	<.25 >
Gain on Sale of Assets			<9.94 >	-0-
Misc. Income	<316.51 >	<.05 >	<53,827.24 >	<4.41 >
Total Other Income	<1,015.84 >	<.16 >	<60,614.13 >	<4.96 >
Other Deductions:				
Income Before Taxes	228,300.28	35.80	41,688.15	3.41

INCOME STATEMENT

Plant: Florin Month: June 1983

	Current Income & Exp.	Month % of Gross Sales	Year To Income & Exp.	Date % of Gross Sales
Gross Sales:				
Concrete Pipe & Products	46,124.80	100.00	231,275.00	100.00
Deduct:				
Delivery Costs	19,584.94	42.46	40,181.84	17.37
Net Sales	26,539.86	57.54	191,093.16	82.63
Cost of Products Sold	65,382.08	141.75	395,492.03	171.01
Gross Profit on Sales	<38,842.22 >	<84.21 >	<204,398.87 >	<88.38 >
Operating Expenses:				
Selling	6,259.74		39,876.21	
Administrative	9,278.70		58,972.74	
Engineering	829.73		5,427.62	
Total Operating Expenses	16,368.17		104,276.57	
Income From Operations	<55,210.39 >		<308,675.44 >	
Other Income:				
Discounts Earned	<.24 >		<1.03 >	
Royalties	<1,791.34 >		<7,392.03 >	
Recovery on Bad Debts			<3,022.86 >	
Gain on Sale of Assets			<682.00 >	
Misc. Income	<6,070.62 >		<58,356.90 >	
Total Other Income	<7,862.20 >		<69,454.82 >	
Other Deductions:				
Income Before Taxes	<47,348.19 >		<239,220.62 >	

EXHIBIT F

REPORT ON
EMPLOYER WITHDRAWAL LIABILITY

CONSTRUCTION LABORERS PENSION TRUST
FOR SOUTHERN CALIFORNIA

January 1, 1982

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October 1982

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October 8, 1982

Board of Trustees
Construction Laborers Pension
Trust for Southern California
Los Angeles, California

Gentlemen:

This report summarizes and reviews the Plan's status and experience with respect to employer withdrawal liability as of December 31, 1981. It outlines the withdrawal liability provisions adopted, and explains the calculation for determining the amount of liability of a withdrawn employer.

The information in this report has been separated into the following sections:

I. DETERMINATION OF WITHDRAWAL LIABILITY ..... p. 3

II. THE PLAN'S WITHDRAWAL LIABILITY POOLS.... p. 7

III. WITHDRAWAL LIABILITY EXPERIENCE..... p. 9

APPENDIX A: THE PLAN'S METHOD FOR ALLOCATING WITHDRAWAL LIABILITY p. 10

APPENDIX B: EXAMPLE – WITHDRAWAL IN 1982..... p. 13

APPENDIX C: WITHDRAWAL LIABILITY WORKSHEETS ..... p. 16

ATTACHMENT: ACTUARIAL CERTIFICATION OF WITHDRAWAL LIABILITY POOLS

We look forward to reviewing this information with you at your next meeting.

Sincerely,

/s/ James Laws, F.S.A.
Vice President and Actuary

cc: Co-legal Counsel
Administrator
Collection Office
Mr. Emil Matyas

I. DETERMINATION OF WITHDRAWAL LIABILITY

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), signed into law on September 26, 1980, requires assessment of withdrawal liability on an employer that withdraws from the Plan. Under the law an employer has withdrawn completely if it has permanently ceased operations under the Plan or has permanently ceased to have an obligation to contribute to the Plan. Withdrawal may also be partial. An employer in the construction industry is considered to have withdrawn from the plan only if he continues to do the same type of work in the jurisdiction of the labor contract.

The amount of withdrawal liability is based essentially on the Plan's unfunded vested benefits at the time of withdrawal. For this purpose "vested benefits" are the benefits which are not forfeitable if the participant incurs a permanent break in service. The unfunded part refers to the amount not covered by assets.

The Plan's method of allocating liability to employers that withdraw from the Plan involves prorating the

unfunded vested liability as of December 31, 1979 plus (or minus) a proration of changes in the liability at each subsequent year end.

The allocation method, described more fully in Appendix A, is reviewed in this section. There is an annual determination of the Plan's unfunded vested liability, and this makes possible an allocation to any withdrawing employer or one who requests the information. The "allocation" is simply a bookkeeping record, without effect, unless the employer withdraws.

The unfunded vested liability as of December 31, 1979 becomes the first pool of allocable liability and is prorated among the employers in proportion to their contributions in the 5-year period that ended on that date. For a withdrawal in the year ended December 31, 1980, that was the only pertinent figure.

For withdrawals in 1981 and later years, year-to-year changes in the unfunded vested liability are included in determining a withdrawn employer's obligation. If a change was favorable – that is, a drop in the unfunded vested liability – it is applied as an offset or credit against liability from other years.

The new pool of allocable liability is determined by comparing the unfunded vested liability at the end of the most recent year with the unamortized balance of the corresponding figures from the previous year or years. "Unamortized balance" refers to the fact that the old unfunded liability amounts are reduced annually by 5 percent of their original amounts; for example, the December 31, 1979 pool is reduced by 5% to determine its value on December 31, 1980.

This new pool (as of December 31, 1980) is allocable, when necessary, to a withdrawn employer in proportion to its contributions in the 5-year period that ended on that date.

The same process is repeated annually, so that the total withdrawal liability for a particular employer consists of the sum of several allocated amounts. However, each annual allocated amount is reduced by 5 percent with each passing year.

Other liability pools may be established and added to the total amount to be allocated for possible withdrawal liability; namely, the amounts not collected because of bankruptcy, deductibles subtracted from amounts actually assessed, or other limitations on withdrawal assessments specified in the law. These noncollected or nonassessable amounts are reallocated among the employer accounts. For purposes of this report, these are referred to as "reallocated pools" to distinguish them from the "basic pools", described above. These amounts are also subject to a subsequent 5 percent annual write-down.

If an employer withdraws, the unamortized balances allocated for it for each previous year during which it participated in the Plan are added up. (Negative balances are subtracted.)

To repeat, these allocations are simply a bookkeeping account. The resulting figures are converted into a liability assessment only if and when an employer withdraws.

Deductible

The gross charge for withdrawal is subject to a maximum deductible of $50,000 but not more than 3/4 of 1 percent of the Plan's unfunded vested liability as of the Plan year-end prior to withdrawal. If the gross liability of a specific employer is less than that amount, there is no assessment on the employer. If it is somewhat more, the deductible is applied on a diminishing basis – for every dollar the gross liability of the withdrawn employer is over $100,000, the deductible is reduced by a dollar. (In short, if an employer's gross liability exceeds $100,000 plus the maximum deductible, there is no deductible.)

Since 3/4 of 1 percent of the Plan's unfunded vested liability has been greater than $50,000, the maximum deductible has been $50,000.

A withdrawing employer with a gross liability of $50,000 or less would not be assessed any liability. If the employer's gross liability were more than $50,000 but less than $100,000, then the assessed liability would equal the gross liability less $50,000. If the gross liability were less than $150,000 but greater than $100,000, the deductible would be determined by subtracting the gross liability from $150,000. If the gross liability were greater than $150,000, there would be no deductible.

Maintenance of allocations

Even if no employer withdrawal had occurred, the method requires determination annually of the value of the Plan's unfunded liability for vested benefits. The Plan must be in a position to prorate liability based on the

withdrawn employer's contribution history. These procedures and records are necessary in order to be able to determine an assessment should withdrawal occur and also to respond, as required by law, to an inquiry from a participating employer as to the amount of its potential liability.

Actuarial assumptions

Determination of the value of vested benefits has to be based on a set of actuarial assumptions. The law prescribes that the assumptions and methods used must be reasonable in the aggregate and "offer the actuary's best estimate of anticipated experience under the plan." It also authorizes the Pension Benefit Guaranty Corporation (PBGC) to promulgate other assumptions and methods for use by the Plan's actuary. However, the PBGC has not yet promulgated withdrawal liability assumptions.

Our "best estimate" involves the same actuarial assumptions as are used in our valuations for Plan funding, with the exception of the assumed rate of investment return, the value ascribed to Plan assets, and expenses. The method used for determining the unfunded vested liability is as follows:

1. To the extent the market value of assets covers the liability, the interest assumptions are on a plan termination basis, using interest assumptions developed by the PBGC for single employer plan terminations. As of December 31, 1981, the interest assumption applicable to retirees was 11.00% (as of December 31, 1980 and 1979, the corresponding interest assumptions were 9.25%

and 8.50%); lower interest assumptions apply to deferred retirees.

2. Any remaining unfunded vested liability is valued at the valuation rate of interest of 6.00%

3. Other actuarial assumptions are the same as applied in the actuarial valuation although there is no explicit allowance for administrative expenses. An expense assumption is implicit in the PBGC interest assumptions.

Further details are given in the attached actuarial certification.

Payment of withdrawal liability

The total amount of an employer's withdrawal liability is not ordinarily payable in a lump sum. The law fixes annual payment amounts, to be paid in quarterly installments, unless the plan has fixed some other schedule. The Trustees have adopted a monthly payment schedule. The annual payment (for complete withdrawal) required from a withdrawn employer is determined by multiplying:

(1) the highest hourly rate the employer was obligated to pay during the last 10 Plan Years in which it participated, by

(2) the employer's average covered hours in the 3 consecutive Plan Years (within the 10 years preceding withdrawal) in which its covered hours were highest.

Payment discontinues when the total liability, with interest, has been paid. (The law imposes a 20-year maximum.) Interest is charged during the payout period at the valuation rate of interest (6.00%).

II. THE PLAN'S WITHDRAWAL LIABILITY POOLS

Basic Pools

The plan's aggregate unfunded vested liability for the past three years and the December 31, 1981 basic withdrawal liability pools are shown below.

Plan Year Ended December 31	Aggregate Unfunded Vested Liability	Withdrawal Liability Pool as of December 31, 1981
1979	$493,322,600	$443,990,400
1980	514,181,200	43,248,500
1981	532,621,400	45,382,500
Total of Basic Withdrawal Liability Pools as of December 31, 1981		$532,621,400

It should be noted that the sum of the three basic pools ($532,621,400) equals the aggregate unfunded vested liability as of December 31, 1981.

Reallocated pools

In addition, withdrawal liability includes a prorated share of the nonassessable or noncollectible liabilities that have been reallocated. Those allocations are also reduced by 5% each year.

The first reallocated pool, equal to $795,500, has been established as of December 31, 1981. This amount equals the sum of:

1. The deductible amounts of employers who had withdrawn as of December 31, 1981 and received a notice of withdrawal; and,

2. The gross liability of employers who had withdrawn as of December 31, 1981 and have filed a bankruptcy notice.

Further discussion of the withdrawal liability experience through December 31, 1981 is contained in Section III of this report.

The details for the determination of the unfunded vested liability amounts and the withdrawal liability basic and reallocated pools are contained in Exhibits I and II of the attached actuarial certificate.

Determination of withdrawal liability

As explained earlier, an employer's withdrawal liability is determined by adding up the balances (as of the preceding Plan Year end) of its share of the basic pools and of any reallocated pools. "Balances" refers to the fact that each pool is written down annually by 5% of its original amount. Each pool is prorated to each employer based on the ratio of the employer's obligated contributions in each 5-year period prior to the establishment of the pool.

Appendix B provides a detailed example of how the pools and procedures described herein are applied to determine the withdrawal liability and payment schedule for a hypothetical employer who withdrew during 1982.

Appendix C provides the administrative worksheets which can be used to calculate or estimate the amount of withdrawal liability for an employer withdrawing in 1982 by filling in the appropriate 5-year contribution figures.

III. WITHDRAWAL LIABILITY EXPERIENCE

Based on information received from the Collection Office, this section reviews the withdrawal liability experience of the Trust through December 31, 1981. The information included 43 withdrawn employers to whom a liability notice was sent. Of this total, six employers elected to re-sign the labor agreement, leaving 37 employer withdrawals.

Of these 37 withdrawn employers, seven are shown as not employing laborers in this jurisdiction so that no liability is collectible at this time. If any of these seven employers do employ laborers in the jurisdiction within the ensuing five years, the Collection Office will then rebill them for withdrawal liability. The gross liability (before the deductible amount) for these seven employers totalled $559,531.

One of the withdrawn employers is selling his business and the withdrawal liability billing may change following the asset sale in accordance with the provisions of MPPAA – the current billed amount is for $157,998.

One of the withdrawn employers has filed for bankruptcy and his assessment of $88,655 ($119,327 less deductible of $30,672) is presumed uncollectible.

All but one of the remaining 28 withdrawn employers have outstanding withdrawal payment obligations to the

Trust – one withdrawn employer paid his obligation in full in November, 1981. The audit report shows that the total withdrawal liability payments actually received during 1981 totalled $25,043. The total deductible amounts for these 28 employers was $676,128. This amount plus the $119, 327 liability of the bankrupt employer, a total of $795,455, has been established as a reallocated pool as of December 31, 1981 – this is an accordance with the specific provisions of MPPAA.

MPPAA also allows the Trustees to include in the reallocated pool any amount which they determine "to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation." Based on this section of the Act, we believe the Trustees have the option of including in the reallocated pools the following amounts:

1. The $559,531 gross liability for the seven withdrawn employers no longer employing laborers in this jurisdiction; and

2. The gross liability of withdrawn employers who were not sent a notice of withdrawal because it was clear that the liability, amount was less than the $50,000 deductible amount. Although the total amount of liability for this group of employers is not known, we do understand that there are approximately 400 withdrawn employers included in this category as of December 31, 1981.

APPENDIX A

THE PLAN'S METHOD FOR ALLOCATING WITHDRAWAL LIABILITY

The Plan determines the liability of an employer that has completely withdrawn on the basis of the statutory method defined in Section 4211(b) of ERISA.

The liability assessed to an employer for complete withdrawal from the plan is determined as the sum of the unamortized balances, as of the end of the Plan Year preceding withdrawal, of the employer's prorated shares of each of the following:

(1) the Plan's unfunded liability for vested benefits as of December 31, 1979;

(2) the change in th_ Plan's unfunded liability for vested benefits as of the end of each subsequent Plan Year (to the end of the Plan Year preceding withdrawal); and

(3) reallocated amounts that would have been payable to the Plan as withdrawal liability payments for withdrawals in preceding years, except that they were nonassessable under certain statutory provisions or not collectible.

Unamortized balances. The "unamortized balance" of each of these three sources of liability assessment is determined by reducing each figure by 5 percent of its original amount for each full year from the end of the Plan Year as of which the charge was originally determined to the end of the Plan Year immediately preceding withdrawal.

Initial amount. The Plan's unfunded liability for vested benefits as of December 31, 1979 was determined by

subtracting the market value of Plan assets from the value of vested benefits under the Plan.

Annual changes. The change in the Plan's unfunded liability for vested benefits as of December 31, 1980 is determined as follows:

(1) by establishing the Plan's unfunded liability for vested benefits as of December 31, 1980 (the value then of the Plan's vested benefits less the market value, then, of its assets), and

(2) by subtracting 95 percent (that is, the unamortized balance) of the Plan's unfunded vested liability as of December 31, 1979.

The change in the Plan's unfunded liability for vested benefits as of the end of any subsequent Plan year is determined as follows:

(1) by establishing the Plan's unfunded liabilty [sic] for vested benefits as of the end of that Plan Year, and

(2) by subtracting the total of (a) the unamortized balance of the unfunded liability for vested benefits as of December 31, 1979 and (b) the unamortized balance of each previous annual change after December 31, 1979.

(If the Plan had no unfunded liability for vested benefits as of the end of a year, the unfunded liability is entered as zero.)

A positive change represents an unfunded liability for vested benefits *greater* than the total of the unamortized

balances and is therefore an addition to potential liability assessments for future withdrawals. A negative change represents an unfunded liability for vested benefits *lower* than the total of unamortized balances and is therefore a credit against amounts that would otherwise determine potential liability assessments for future withdrawals. In the determination of an annual change, if the total of the unamortized balances is negative, it is treated as zero.

Reallocated uncollectibles. The total amount, if any, of unfunded liability for vested benefits determined in any Plan year after December 31, 1979 to be nonassessable or noncollectible with respect to employers that withdrew is established as an amount to be prorated among each of the participating employers as an additional withdrawal liability amount. Nonassessable amounts consist of amounts deducted under the *de minimis* rule (sec. 4209), amounts not payable because of the 20-year limit (sec. 4219(c)(1)), and amounts not payable because of the limitations in the event of sale of all of the employer's assets (sec. 4225). Noncollectible amounts consist of amounts that are noncollectible for reasons arising out of cases under the federal bankruptcy law or similar proceedings.

Each annual amount of reallocable nonassessable and noncollectible is written down by 5 percent of the original amount for each full year from the date as of which it was originally determined to the end of the Plan year preceding withdrawal.

Proration to the employer. The unamortized portion of the initial amount of unfunded liability for vested benefits, each annual change in the unfunded liability for vested benefits, and each annual reallocable amount is prorated

to each employer, for determining the amount of its liability in the event of its complete withdrawal, on the basis of the ratio of the employer's obligated contributions to the Plan to the total employer contributions to the Plan during the 5 years ending with the end of the Plan year as of which each of the amounts was determined.

The total of employer contributions with respect to an apportionment base period is reduced by any contributions otherwise included in the total that were made by a significant employer that withdrew from the Plan in or before the Plan Year in which the change or reallocation arose, and by any other employer to which a notice of withdrawal liability was sent by the Plan within the apportionment base period.

A "significant employer" means –

(A) an employer that contributed, in any one Plan Year of the relevant period, at least 1% of total employer contributions to the Plan for that year, as determined for purposes of the relevant denominator or, if lower, $250,000 and

(B) any other employer that was a member of an employer association, a group of employers covered by a single collective bargaining agreement or a group of employers covered by agreements with a single labor organization, if the contribution obligations of substantially all members of the group ceased in a single Plan Year and the group's aggregate contributions to the Plan in any one Plan Year of the relevant period totalled at least 1% of

total employer contributions to the Plan for that year or, if lower, $250,000.

De minimis. Each withdrawal liability assessment is the total of the unamortized balances of the allocated amounts, as defined above, less a *de minimis* deductible. The deductible is $50,000 (but not more than 3/4 of 1 percent of the Plan's unfunded liability for vested benefits). This deductible amount is reduced, dollar for dollar, by the amount by which the total of charges prorated to the employer exceeds $100,000.

APPENDIX B

EXAMPLE – WITHDRAWAL IN 1982

In this example, it was assumed withdrawal occurred in 1982 and the hypothetical employer had been contributing at $3.28 per hour. The contributory hours and contribution rates on behalf of this employer were assumed to be as follows:

Year Ended December 31	Hours	Average Hourly Contribution Rate
1981	15,000	$3.09
1980	20,000	2.73
1979	70,000	2.50
1978	30,000	2.45
1977	55,000	2.13
1976	50,000	1.70
1975	70,000	1.53
1974 & Earlier	30,000	Not applicable

Based on the above chart, this employer's contributions over the relevant 5 year periods would be as follows:

Five Year Period	Employer's Contributions
1975-79, inclusive	$557,750
1976-80, inclusive	505,250
1977-81, inclusive	466,600

The calculation of withdrawal liability for this employer is shown on the following worksheets. Line D of the worksheet on the following page shows that the liability assessment to this hypothetical employer is $1,032,659. This would be paid at the rate of $15,944 per month over an 80 month period plus a smaller final payment of $10,508.

EMPLOYER WITHDRAWAL LIABILITY WORKSHEET FOR WITHDRAWALS DURING THE PERIOD JANUARY 1, 1982 THROUGH DECEMBER 31, 1982

Employer Name: Example

Pool Established	Withdrawal Liability Pool (basic plus reallocated) as of December 31, 1981	Total Plan Contributions During 5-Year Period Prior To Date Pool Established*	Withdrawn Employer Contributions During 5-Year Period Prior To Date Pool Established	Allocation of Withdrawal Liability Pool To Withdrawn Employer. Equals [(4) + (3)] x (2)
(1)	(2)	(3)	(4)	(5)
12/31/79	$443,990,300	$273,549,700	$557,750	$905,267
12/31/80	43,248,500	320,477,600	505,250	68,184
12/31/81	46,178,000	363,916,800	466,600	59,208

*The amounts in this column should be reduced by the contributions of either withdrawn "significant employers" or other employers which received a notice of withdrawal and withdrew from the plan prior to the date shown in column (1).

A.	Aggregate unfunded vested liability as of December 31, 1981	$532,621,400
B.	Withdrawal Liability Attributable to Withdrawn Employer sum of column (5)	1,032,659
C.	Employer's Deductible Amount**	0
D.	Net Withdrawal Liability [line B minus line C]	1,032,659
E.	Withdrawn employer's average annual hours for highest 3 consecutive years during 10 year period preceding January 1, 1982 (1975 to 1977)	58,333
F.	Withdrawn employer's annual payment: equals (E) multiplied by hourly rate***	191,332
G.	Length of payment period (see attached worksheet)	81 months

**The maximum deductible is $50,000. An individual withdrawn employer's deductible is determined as follows:

If line B is less than $50,000, stop here – there is no liability.

If line B is over $50,000, but less than $100,000, enter difference between $50,000 on line C.

If line B is over $100,000 but less than $150,000, enter difference between $150,000 and the line B amount. For example: If line B is $110,000, enter $40,000 ($150,000 minus $110,000).

If line B is $150,000 or more, enter zero – there is no deductible.

***Highest hourly rate at which employer was obligated to contribute – generally $3.28 if withdrawal occurred prior to July 1 and $3.74 if withdrawal occurred on or after July 1, 1982.

Construction Laborers Pension Trust
for Southern California

Worksheet for Determining Length
of Payment Period

Employer name Example

(a)	Required annual payment	$ 191,332
(b)	Withdrawal liability after deductible	$ 1,032,659
(c)	Amount to be amortized = (b)x(1.06000)	$ 1,094,619
(d)	Amortization ratio = (c)/(a)	5.721043
(e)	Largest value in Table Col. I which is less than (d)	5.212364
(f)	Number of years for value (e)	6
(g)	Amount amortized in (f) years = (a)x(e)	$ 997,292
(h)	Amount left to amortize = (c)-(g)	$ 97,327
(i)	Table Col. II value for (f) years	1.418519
(j)	Amount to amortize in final year = (h) x (i); show 0 if (f)=20	$ 138,060
(k)	*Monthly payment* = (a) divided by 12	$ 15,944
(l)	Full payments in final year = (j)/(k)	8
(m)	*Number of full payments* = (l) + 12x(f)	80
(n)	*Final payment* = (j) - (k)x(l)	$ 10,508

Employer payment schedule:

$ 15,944 (k) per month for 80 (m) months plus a final payment of $ 10,508 (n)

October 8, 1982

APPENDIX C

WITHDRAWAL LIABILITY WORKSHEETS

The first worksheet included in this appendix can be used to determine the liability of an employer who withdraws from the Plan in 1982.

The second worksheet and the 6.00% interest function sheet can be used to determine the specific payments required of the withdrawn employer.

EMPLOYER WITHDRAWAL LIABILITY WORKSHEET FOR WITHDRAWALS DURING THE PERIOD JANUARY 1, 1982 THROUGH DECEMBER 31, 1982

Employer Name: _____

Pool Established	Withdrawal Liability Pool (basic plus reallocated) as of December 31, 1981	Total Plan Contributions During 5-Year Period Prior To Date Pool Established*	Withdrawn Employer Contributions During 5-Year Period Prior To Date Pool Established	Allocation of Withdrawal Liability Pool To Withdrawn Employer. Equals [(4) ÷ (3)] x (2)
(1)	(2)	(3)	(4)	(5)
12/31/79	$443,990,300	$273,549,700		
12/31/80	43,248,500	320,477,600		
12/31/81	46,178,000	363,916,800		

*The amounts in this column should be reduced by the contributions of either withdrawn "significant employers" or other employers which received a notice of withdrawal and withdrew from the plan prior to the date shown in column (1).

A. Aggregate unfunded vested liability as of December 31, 1981 ..... $532,621,400
B. Withdrawal Liability Attributable to Withdrawn Employer sum of column (5) ..... _____
C. Employer's Deductible Amount** ..... _____
D. Net Withdrawal Liability [line B minus line C] ..... _____
E. Withdrawn employer's average annual hours for highest 3 consecutive years during 10 year period preceding January 1, 1982 (1975 to 1977) _____
F. Withdrawn employer's annual payment: equals (E) multiplied by hourly rate*** ..... _____
G. Length of payment period (see attached worksheet) ..... _____

**The maximum deductible is $50,000. An individual withdrawn employer's deductible is determined as follows:

If line B is less than $50,000, stop here – there is no liability.

If line B is over $50,000, but less than $100,000, enter difference between $50,000 on line C.

If line B is over $100,000 but less than $150,000, enter difference between $150,000 and the line B amount. For example: If line B is $110,000, enter $40,000 ($150,000 minus $110,000).

If line B is $150,000 or more, enter zero – there is no deductible.

***Highest hourly rate at which employer was obligated to contribute – generally $3.28 if withdrawal occurred prior to July 1 and $3.74 if withdrawal occurred on or after July 1, 1982.

Construction Laborers Pension Trust for Southern California

Worksheet for Determining Length of Payment Period

Employer name _____

(a) Required annual payment $ _____

(b) Withdrawal liability after deductible $ _____

(c) Amount to be amortized = (b)x(1.06000) $ _____

(d) Amortization ratio = (c)/(a) _____

(e) Largest value in Table Col. I which is less than (d) _____

(f) Number of years for value (e) _____

(g) Amount amortized in (f) years = (a)x(e) $ _____

(h) Amount left to amortize = (c)-(g) $ _____

(i) Table Col. II value for (f) years _____

(j) Amount to amortize in final year = (h) x (i); show 0 if (f)=20 $ _____

(k) *Monthly payment* = (a) divided by 12 $ _____

(l) Full payments in final year = (j)/(k) _____

(m) *Number of full payments* = (l) + 12x(f) _____

(n) *Final payment* = (j) - (k)x(l) $ _____

Employer payment schedule:

$ _____ (k) per month for ____ (m) months plus a final payment of $ _____ (n)

October 8, 1982

Construction Laborers Pension Trust
for Southern California

	I	II
Number of Years	Present Value of $1 Per Year	Accumulation of $1
0	.000000	1.000000
1	1.000000	1.060000
2	1.943396	1.123600
3	2.833393	1.191016
4	3.673012	1.262477
5	4.465106	1.338226
6	5.212364	1.418519
7	5.917324	1.503630
8	6.582381	1.593848
9	7.209794	1.689479
10	7.801692	1.790848
11	8.360087	1.898299
12	8.886875	2.012196
13	9.383844	2.132928
14	9.852683	2.260904
15	10.294984	2.396558
16	10.712249	2.540352
17	11.105895	2.692773
18	11.477260	2.854339
19	11.827603	3.025600
20	12.158116	3.207135

i = .0600

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October 8, 1982

CONSTRUCTION LABORERS PENSION TRUST
FOR SOUTHERN CALIFORNIA

Actuarial Certification of
Withdrawal Liability Pools

This is to certify that we have prepared an actuarial valuation to calculate the pools used to assess withdrawal liability to employers who withdraw during the year beginning January 1, 1982. The calculations were performed in accordance with generally accepted actuarial principles and practices.

The certification contains the following attached exhibits:

EXHIBIT I: Unfunded Present Value of Vested Benefits

EXHIBIT II: Withdrawal Liability Pools as of December 31, 1981

EXHIBIT III: Actuarial Assumptions

The valuation was based on information supplied by the auditor with respect to contributions and assets, by the Plan Administrator with respect to the data required on employees and pensioners, and by the Collection Office with respect to withdrawn employers. We have not verified and normally would not verify such information, but we have no reason to doubt its substantial accuracy.

To the best of my knowledge, the information supplied in this actuarial valuation is complete and accurate and in my opinion the assumptions used in the aggregate (a) are reasonably related to the experience of the plan and to reasonable expectations, and (b) represent my best estimate of anticipated experience under the plan.

/s/ James Laws

Certified by: James Laws, F.S.A.
Vice President and Actuary
Enrolled Actuary No. 2726

/s/ Nancy Braun

Reviewed by: Nancy Braun, M.A.A.A.
Associate Actuary

EXHIBIT I

UNFUNDED PRESENT VALUE OF VESTED BENEFITS

Following are the number of participants included in the calculations:

	Year Ended December 31,		
	1979	1980	1981
a. Active vested employees	6,006	6,139	5,727
b. Inactive vested employees	1,464	1,609	1,722
c. Pensioners, beneficiaries, and suspended pensions	7,361	7,621	7,990

The determinations of the unfunded value of vested benefits for withdrawal liability purposes for the past three years are as follows:

	Year Ended December 31,		
	1979	1980	1981
1. Present value of vested benefits based on valuation interest rate	$698,411,000	$794,265,900	$863,610,600
2. Present value of vested benefits based on PBGC investment return rates	569,649,600	609,789,400	587,279,400
3. Assets at market value	167,276,200	215,032,100	225,081,900
4. Ratio funded at PBGC rates (3) ÷ (2)	.29365000	.35263338	.38326204
5. Unfunded value of vested benefits for withdrawal liability purposes (1.00 - (4)) x (1)	$493,322,600	$514,181,200	$532,621,400

EXHIBIT II

WITHDRAWAL LIABILITY POOLS AS OF DECEMBER 31, 1981

Pool Established December 31	Original Amount		Pool Balance on December 31, 1980		Amortized Amount*		Pool Balance on December 31, 1981		
	Basic Pool	Reallocated Pool	Basic Pool	Reallocated Pool	Basic Pool	Reallocated Pool	Basic Pool	Reallocated Pool	Total Pool
1979	$493,322,600	–	$468,656,500	–	$24,666,100	–	$443,990,400	–	$443,990,400
1980	45,524,700	–	45,524,700	–	2,276,200	–	43,248,500	–	43,248,500
1981	45,382,500	$795,500	–	–	–	–	45,382,500	$795,500	46,178,000
	Totals		$514,181,200	–	$26,942,300	–	$532,621,400	$795,500	$533,416,900

*Each pool is amortized annually at the rate of 5% of its original amount.

Note: The sum of the basic pools on December 31, 1981 ($532,621,400) equals the aggregate unfunded value of vested benefits for withdrawal liability purposes on that date (see Exhibit I).

EXHIBIT III

ACTUARIAL ASSUMPTIONS

Investment return and asset valuation:

The unfunded present value of vested benefits for employer withdrawals is given by the formula:

$$\frac{C-A}{C} \times B, \text{ where}$$

A = market value of assets,

B = present value of vested benefits based on valuation investmet return assumption on the applicable withdrawal liability valuation date, and

C = present value of vested benefits based on interest assumptions developed by PBGC for single employer plan terminations on the applicable withdrawal liability valuation date.

The rates referred to in B and C are as follows:

	Year Ended December 31		
	1979	1980	1981
Valuation investment return	6.00%	6.00%	6.00%
PBGC rates:			
(a) Benefit payout period	8.50	9.25	11.00
(b) Seven-year period preceding assumed benefit commencement date	7.75	8.50	10.25
(c) Eight-year period preceding period described in (b)	6.50	7.25	9.00
(d) Deferral periods in excess of 15 years	4.00	4.00	4.00

Administrative expenses: Allowance by discount implicit in investment return rates assumed.

Mortality: Male 1971 Group Annuity Mortality Table with ages set forward one year for participants and set back five years for spouses of participants. For disabled pensioners, the PBGC mortality table for disabled males receiving Social Security benefits for plan terminations prior to December 1, 1980, was utilized.

Retirement age: Varies with entry age as follows:

Age at Entry in Covered Employment	Retirement Age
Under 23	55
23 - 27	57
28 - 32	59
33 - 47	63
48 - 52	65
53 & over	66*

*Or completion of service requirement, if later.
Inactive vested participants are assumed to retire immediately if they have 25 or more years of credited service, at age 62 if they have at least 15 years of credited service but less than 25, and at age 65 if they have less than 15 years of credited service.

Amount of unrecorded past service credit for eligible nonretired participants:

Varies with year of birth as follows:

Year of Birth	Years of Unrecorded Credit
1912 - 1916	5
1917 - 1921	4
1922 - 1926	3
1927 - 1931	3
1932 - 1936	2
1937 - 1941	1
After 1941	0

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MALCOLM M. LUCAS,
JUDGE PRESIDING

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Plaintiff, vs. CEN-VI-RO CONCRETE PIPE & PRODUCTS, INC., Defendant.	)	No. CV 82-5184-MML
CONCRETE PIPE & PRODUCTS COMPANY OF CALIFORNIA, Plaintiff, vs. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant.	)	No. CV 83-132-MML

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, March 19, 1984

DON MEHLER, CSR
Official Reporter
442 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

APPEARANCES:

For Construction Laborers Pension Trust for Southern California:

COX, CASTLE & NICHOLSON
By: EVERITT G. BEERS
2049 Century Park East, 28th Floor
Los Angeles, California 90067

For Concrete Pipe & Products Company, Inc.:

DIEPENBROCK, WULFF, PLANT & HANNEGAN
By: DENNIS R. MURPHY
455 Capitol Mall, Suite 800
Sacramento, California 95814

[p. 3] LOS ANGELES, CALIFORNIA, MONDAY, MARCH 19, 1984; 10:00 A. M.

(Other Court matters.)

THE CLERK: Item No. 15, CV 82-5184, Construction Laborers Pension Trust for Southern California v. Cen-Vi-Ro Concrete Pipe & Products, for cross-motions for summary judgment.

Counsel, state your appearances, please.

MR. BEERS: Everitt beers, Cox, Castle & Nicholson, for the Construction Laborers Pension Trust.

THE COURT: Good morning.

MR. MURPHY: Dennis Murphy appearing on behalf of Concrete Pipe & Products Company.

THE COURT: Good morning, gentlemen.

I have read and considered what has been filed in this matter. Does either side wish to be heard further?

MR. MURPHY: Your Honor, Concrete Pipe & Products would just like to address a few issues. In our briefs we addressed very technical legal points, and I would just like to point out a few pragmatics of the situation. I think it's necessary to understand, in discussing the constitutional arguments, the retroactive effect of the particular actions. As you know, the unions on behalf of their clients, the employees, demand that employers enter into these multi-employer plans. Employers agree for a certain sum of money and then set their prices for their goods and services based on the contractual rate of pay. And in this case, our client [p. 4] stopped producing the widgets – in this case, concrete pipe – two years before or a year and a half before the act was passed. All their financial transactions are closed. There is no way to recover the money. And now we are being assessed almost two times what we paid as unfunded liability upon withdrawal from the trust fund. And while the act is not retroactive in that it is applying – all the arguments don't go to that – it is retroactive in its effect in its total application to this particular person or this particular

business and should be viewed as such, your Honor, because there is absolutely no way for Concrete Pipe & Products Company to recover one dime of the money by way of increasing its costs of its product. I think that's a very important issue.

I think that also, the act is passed, and the financial impact upon somebody going out of business is disastrous and has to be considered a taking of money from one to another, as the Alton case, which was cited by the Ninth Circuit as good authority, properly points out. To me, that is the practical effect of what is going on. They're going into closed transactions. They're taking money from one and potentially bankrupting one to give money to another, despite contract provisions that specifically prohibit this.

With respect to another area, I would like to [p. 5] point out the pragmatic effect. In this particular case, the trust funds come in with a presumption that their decisions are correct. They are entitled to determine the amount of liability under four formulas. They don't have to state any method which they choose the formula. It can be relevant or not relevant. They can go from 5 percent on actuarial rates to 9, 10, 12, and based on whatever they do, you can go from zero liability to hundreds of thousands of dollars, and their judgment is presumed correct in litigation, and there is no rational basis for this. In fact, the statute on that point not only presumes them to be correct, but is extremely vague in saying what basis they use in making their determination. They don't have to use data. They can use their best estimates of what is correct. And if they don't have sufficient base data, they

can use a sampling of data. And all that is required is that in the aggregate, it be reasonable or their best estimate.

And I feel that all these things have got to be considered in determining whether my clients have been given any real due process in this issue.

THE COURT: All right. Let me ask, Mr. Murphy, do you agree that the threshold question may well be, the factual question, that is, when Concrete Pipe withdrew? If Concrete Pipe did, from a factual standpoint, cease operations in 1979, in essence, withdrawing from the pension trust [p. 6] plan, then we would never reach the constitutional issues in this –

MR. MURPHY: Well, that's our first point, your Honor. We think that we've briefed that capably. I think it comes down to a definition, does permanently cease to cover operations, does the term "permanently" mean lasting forever or does it mean lasting indefinitely, like the opposing side has defined in their brief? We think that this is clearly one that is a permanent cessation of operations under the term "lasting indefinitely."

THE COURT: Well, before we go further into the merits of that question, it is a factual question and will have to be resolved further in processing this case. But in terms of the resolution of that factual dispute, who is to resolve it, the court or an arbitrator?

MR. MURPHY: I think, your Honor, the court is to resolve it, because our position on that is simple. If we did in fact withdraw in 1979, we never came under this act. We were out from under it. We have no obligations under it. It doesn't involve us. The act was passed in

September 26, 1980, and we ceased doing business at this plant on August 17, 1979. And we say that that act involves others, but not us. And its retroactive application only goes back to May of 1980. And clearly, we had stopped producing concrete pipe, we had shipped our equipment to our main plants in [p. 7] Sacramento, we had laid off our employees, we were searching for a new plant in San Bernardino or Riverside. We had done everything possible to terminate our business at that particular plant. And we believe that all the facts are basically undisputed. Both counsel try and draw different inferences from the undisputed facts, but I think the facts are undisputed.

THE COURT: All right. Thank you, Mr. Murphy.

MR. MURPHY: Thank you, your Honor.

MR. BEERS: Your Honor, turning first to the issue of withdrawal, we do think that is an issue that's appropriate for the Court to decide here. All the facts are necessary to decide it. It's just a question of interpreting Section 1383, as to what "permanent" means. We don't think any additional –

THE COURT: So I'm clear as to your position, you do not feel that that factual dispute, the issue and question of the date of withdrawal, is a matter that should be heard by an arbitrator?

MR. BEERS: No, your Honor. We feel that further factual development before an arbitrator would not add to the Court's ability to decide that issue now. But if the Court feels that arbitration is appropriate on the

withdrawal issue prior to the Court interpreting the withdrawal provisions, we point out that it would then be necessary to [p. 8] determine the other provisions of the act, which are facial constitutional challenges, and decide the constitutionality of those other provisions as discussed in the papers. Therefore, even if –

THE COURT: Well, I think Shelter Framing said that the constitutional issues, as opposed to factual, do not have to be submitted to the arbitration process.

MR. BEERS: Correct, your Honor; along with Peick, Textile Workers, and Republic.

THE COURT: All right. Go ahead, Mr. Beers.

MR. BEERS: Okay. Responding to what I think are three points made by Mr. Murphy on his presentation, first of all, he talks about the need to recoup costs in the future for the liabilities incurred by Concrete Pipe at its plant in the past. I point out that withdrawal liability is based upon the employer's proportionate share at the time it withdrew of the employee benefits vested at that time, based upon that particular employer's proportionate share of past contributions, as opposed to total contributions, to the trust. There is no future recouping of costs in the future. This is simply Concrete Pipe paying its fair share of benefits promised to employees at the time it withdrew.

Referring to the takings discussion made by Mr. Murphy, he mentions the case of Alton Railroad. Of course, Alton Railroad is one of the United States Supreme [p. 9] Court cases, along with the cases striking down state child-labor laws and the NRA legislation during the early

part of the depression, which the Supreme Court has since, of course, eschewed. The modern rule is, in areas of economic regulation, the court hunts through the legislation based upon a not arbitrary or unreasonable standard, and does not address the underlying wisdom of the legislation.

In this case, the three cases that have addressed this issue, the Second, Fourth, and Seventh Circuits in Textile Workers, Republic, and the Peick decisions, have all upheld the MPPAA unanimously.

Particularly turning to the takings issue, there is no takings involved here. All three of those cases have held that for the takings laws to apply, there has to be a physical taking of property by governmental action, such as garnishment or claim of delivery or similar procedures where the government goes out and seizes property. That is not the case here.

The last argument made by Mr. Murphy was regarding the presumption attached to the initial decision of the trustees regarding the amount of withdrawal liability. There's no constitutional question here. Congress every day and state courts every day set the burden of proof on one side or the other for any matter to be decided by a court. This is simply setting of a burden of proof.

[p. 10] Also, the reasonable actuarial standards test used in the MPPAA for judging and controlling the trustees' setting of withdrawal liability is standard economic legislation. This is economic legislation. It's not legislation in an area involving protective, constitutional conduct, such as freedom of speech. The United States Supreme Court has again and again upheld economic

regulations requiring various organizations to set reasonable prices or reasonable routes.

In closing, your Honor, I just want to point out that, as carefully discussed in our papers, three circuit-court opinions have addressed every single issue in this case and have unanimously upheld the MPPAA on every single aspect challenged by Concrete Pipe. The case of Shelter Framing, which is discussed at length in Mr. Murphy's papers, addressed the sole issue of the constitutionality of the retroactive date of the MPPAA. That case expressly limits its decision to that small part of the MPPAA.

While the Construction Laborers Pension Trust urges your Honor to follow the three decisions that have addressed every issue of the case, if your Honor for some reason finds part of Shelter Framing to be applicable to the facts of this case, we request that your Honor stay this action until the Supreme Court decides Shelter Framing. It is –

[p. 11] THE COURT: The petition for certiorari is still pending before the Supreme Court, is it not?

MR. BEERS: Correct, your Honor. The petition for cert is pending, but the joint appeal, which is part of the same decision of Gray, has had probable jurisdiction noted. That's a federal appeal. The Supreme Court has noted jurisdiction in Gray, scheduled oral argument for April, and the petition for cert has been at each session of the court left pending, which I understand is the normal procedure for the United States Supreme Court when it has two cases that involve the same factual issue, to either grant cert or note probable jurisdiction on one and

just keep the other pending. Since the Supreme Court next to never, except for maybe the Sony case and a couple others, carries decisions over from term to term, I would expect a decision to be written by the United States Supreme Court by the end of this term in July. So if the Court finds Shelter Framing to be at all controlling, I simply request the Court stay further decision in this case until that decision comes out by the end of the term in July.

The last comment I have, your Honor, is regarding a case that was cited in the last set of papers exchanged by the parties, and that is an NLRB decision called Illinois Coil Spring Company. First of all, your Honor, the context in which that case was cited is to support Concrete Pipe's [p. 12] contention that it would have not had to bargain with the unions involved if the plant at Shafter had been moved to another location. Illinois Coil Spring Company is a National Labor Relations Board decision, not a court decision. However, the dissent in there very ably points out how the Board's decision is inconsistent with the United States Supreme Court case of Fiber Products, which held in an analogous situation that there is a duty for mandatory collective bargaining in such a situation. And also, the dissent in that case cites numerous previous NLRB decisions with which the Illinois Coil Spring Company case is inconsistent.

No further comments, your Honor, unless you have questions.

THE COURT: All right. Thank you, Mr. Beers.

Anything further, Mr. Murphy?

MR. MURPHY: One or two, your Honor.

I think your concern, as I sense it here, is: Do you have the right to determine the factual issues in this case? I figure that this is analogous to decisions that come before you all the time. I'm sure there are many people, parties come before you to determine whether they are bound to arbitrate under a contract, and you're quite familiar with the fact that you have to determine the threshold issue as to whether they have contractually [p. 13] obligated themselves to arbitrate, and, if they have, then you go arbitrate all the facts.

Basically, we are saying there is no contract here requiring us to arbitrate. This statute doesn't require us to arbitrate, because this statute doesn't apply to withdrawals that occurred before 1980; May of 1980, to be precise. And I think that that is a clear analogy to the normal cases to compel arbitration that come before this court. It's a determination whether there's a threshold requirement that you go to arbitration. And I don't think the Congress said that people who withdrew before 1980 have to go to arbitration. I think they said that people who withdrew after April 29, 1980, do, but those who did before that point do not have to. And that's why we think that this factual dispute is properly before you.

And then, of course, our position is that the Ninth Circuit Court of Appeals' Shelter Framing decision is in fact controlling, because it did in fact determine most of the elements of these substantive due-process claims, and the Ninth Circuit determined those adversely to the pension trust, and the Ninth Circuit is, of course, controlling in this district.

Thank you, your Honor.

THE COURT: All right. Thank you, Mr. Murphy and Mr. Beers. The matter –

[p. 14] MR. BEERS: Your Honor, just one sentence of clarification?

THE COURT: I think we must stop the ceaseless oscillation of argument, gentlemen. The matter will stand submitted.

MR. BEERS: Thank you, your Honor.

CERTIFICATE

I certify that the foregoing is a true and correct transcript from the stenographic record of proceedings in the foregoing matter.

/s/ Don Mehler — June 26, 1984
Don Mehler, Official Reporter — Date

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff,

v.

CEN-VI-RO, CONCRETE PIPE & PRODUCTS, INC.,

Defendants.

AND CONSOLIDATED ACTION.

NO. CV-82-5184-MML

ORDER GRANTING IN PART PLAINTIFF PENSION TRUST'S MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANT CONCRETE PIPE'S MOTION FOR SUMMARY JUDGMENT, AND COMPELLING PARTIES TO SUBMIT TO ARBITRATION

(Filed Apr. 4, 1984)

The parties' cross-motions for summary judgment came on for hearing before the Court, the Honorable Malcolm M. Lucas, District Judge, presiding, on March 19, 1984. Having duly considered the papers submitted and the views advanced at oral argument, the Court hereby grants in part the motion of Construction Laborers Pension Trust of Southern California, denies in toto the motion of Concrete Pipe & Products, Inc., and orders the parties to submit to arbitration.

BACKGROUND

A. Procedural Background

Plaintiff Construction Laborers Pension Trust for Southern California (Pension Trust) filed its action in 1982

under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1001 et seq., to collect amounts allegedly owed by defendant Concrete Pipe & Products Co. (Concrete Pipe) under amendments to ERISA establishing so-called employer withdrawal liability. In its consolidated action, Concrete Pipe seeks declaratory relief. In its motion for summary judgment on the complaint for declaratory relief, Concrete Pipe contends first that it withdrew from the Pension Trust plan prior to the effective date of the ERISA withdrawal liability amendments, which became law through the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) (codified at 29 U.S.C. §§ 1381-1461 and elsewhere). Concrete Pipe argues further that the MPPAA unconstitutionally denies it substantive due process, procedural due process, the right to just compensation upon a taking, and the right to a trial by jury. The Pension Trust, on the other hand, contends in support of its motion for summary judgment that the MPPAA is constitutional and requests "that this dispute . . . be ordered to arbitration for resolution of the amount of Concrete Pipe's withdrawal liability."

B. Factual Background

The parties have submitted a substantial statement of stipulated facts.

Prior to December 1, 1976, Cen-Vi-Ro, a manufacturer of concrete pipe in Shafter, California, and the Southern California District Council of Laborers (Union) were signatories to a collective bargaining agreement that required payments to the Pension Trust. On December 1, 1976, Concrete Pipe became the owner of the plant and

continued to observe the terms of the collective bargaining agreement. In 1978 Concrete Pipe and the Union entered into a new agreement that continued the Pension Trust obligations of Concrete Pipe.

The collective bargaining agreement of 1978 specified that it would remain in effect until June 30, 1981, and then thereafter from year to year unless either the Union or Concrete Pipe gave notice of a desire to modify or terminate the agreement. The agreement further provided that

> Such written notice shall be given at least 60 days prior to June 30 . . . [and if] no agreement is reached by June 30 . . . the Employer or the [Union] may thereafter give notice [that on a specified date at least 15 days after the notice] the Agreement shall be considered terminated.

In August of 1979, Concrete Pipe ceased production of concrete pipe at the Shafter plant. It stopped purchasing materials, laid off employees, and started removing machinery for shipment to its plant in Sacramento. Through October 1979 to the reopening of the plant in November 1981, only two full-time employees worked at the Shafter plant – one from October 1979 through December 1980, and the other from November 1979 to the reopening. One laborer worked forty hours in May 1980, an occurrence which brought about Concrete Pipe's last payment to the Pension Trust in the same month.

In the spring of 1981, both parties to the collective bargaining agreement sent timely notice of a desire to negotiate a new collective bargaining agreement. Negotiations were conducted in October and November 1981. On November 30, 1981, Concrete Pipe sent to the Union a

letter stating that Concrete Pipe was withdrawing its recognition of the Union.

The plant at Shafter had no production whatsoever from September 1979 through October 1981. In November 1981 the plant was reopened. During that month 10.58 tons of pipe were produced. In contrast, in of July 1979. 773.05 tons were produced.

C. Legal Background

Prior to the MPPAA, an employer's withdrawal from a multi-employer plan created only contingent liability. Under the MPPAA, the withdrawing employer must immediately begin to pay a fixed and certain debt to the plan. The MPPAA was signed into law by President Carter on September 26, 1980. Its provisions, however, were expressly made retroactive to April 29, 1980. 29 U.S.C. § 1461(e)(2)(A).

DISCUSSION

The parties' arguments principally address the constitutional issues referred to above. As a threshold matter, Concrete Pipe would have the Court summarily decide that it withdrew from the Pension Trust plan prior to the effective date of the MPPAA, which, according to the Ninth Circuit, is September 26, 1980. *See Shelter Framing Corp. v. Pension Ben. Guar. Corp.*, 705 F.2d 1502 (9th Cir. 1983) (retroactivity provision of MPPAA is unconstitutional). Apparently, Concrete Pipe would also have the Court decide that the MPPAA is unconstitutional. For its part, the Pension Trust would seemingly have the Court

determine first the constitutional issues and then the factual dispute over the date of Concrete Pipe's withdrawal.*

The Court is of the view that the factual dispute must be decided first because its resolution could render the constitutional questions moot. The Ninth Circuit has held with respect to its own deliberations that it should not reach constitutional issues whenever there are nonconstitutional grounds upon which it can decide the case. *E.g., Polar Shipping Ltd. v. Oriental Shipping*, 680 F.2d 627, 630 (9th Cir. 1982). This rule applies to the District Courts, even when the parties have not considered the possible nonconstitutional basis for deciding the dispute between them. *Correa v. Clayton*, 563 F.2d 396, 400 (9th Cir. 1977).

In specific terms, the factual question is this: Did Concrete Pipe permanently close its Shafter plant in 1979, as Concrete Pipe maintains, or did it, as the Pension Trust argues, simply "mothball" the facility pending its relocation elsewhere in the Union's jurisdiction or pending an increase in business such as apparently occurred in 1981? Having already determined that this question must be resolved prior to the resolution of the myriad constitutional questions, the Court must decide at this point whether the factual question can be determined by it or

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* At oral argument, neither Concrete Pipe nor the Pension Trust wanted the factual question referred to arbitration, notwithstanding the posture in which the Pension Trust's motion for summary judgment comes before the Court, namely, as a motion for a judgment finding MPPAA constitutional *and* an order referring the matter to arbitration.

whether administrative remedies should first be exhausted.

There are two basic types of exhaustion requirements. One is judicially developed, principally to prevent premature judicial interference with agency processes. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1976). The judicial requirement is flexibly applied; the courts are free in given cases to refine the requirement to fit the peculiar facts before them. *Montgomery v. Rumsfeld*, 572 F.2d 250, 253 (9th Cir. 1978). The second basic type is a statutory specified prerequisite to the exercise of jurisdiction by the courts. *Salfi*, 422 U.S. at 766. With this type there is no room for flexibility; failure to exhaust the administrative remedy defeats jurisdiction. *Montgomery*, 572 F.2d at 253. Here, the MPPAA provision on arbitration, 29 U.S.C. § 1401, applies. Despite its seemingly mandatory tone ("any dispute between an employer and the plan sponsor . . . shall be resolved through arbitration"), it is apparent that failure to exhaust the arbitral remedy does not defeat a District Court's jurisdiction. Section 1401(b)(1) explicitly provides that a plan sponsor may bring an action for collection "[i]f no arbitration proceeding has been initiated." Given these statutory terms, it seems reasonable to conclude, as did the District Court in *I.A.M. Nat'l Pension Fund v. Schulze Tool & Die Co.*, 564 F. Supp. 1285, 1293 (N.D. Cal. 1983), that section 1401 codifies the judicial requirement of exhaustion. *See Salfi*, 422 U.S. at 766 (indicating that some statutory requirements may simply codify the judicial requirement).

The judicial requirement must be applied with an understanding of its purposes. *Aleknagik Natives Ltd. v.*

Andrus, 648 F.2d 496, 499 (9th Cir. 1980). Where the pursuit of the administrative remedy seems inapt, a number of exceptions may apply, *id.*, although when, as here, an enactment of Congress enters the scene, the range of the court's discretion may be narrower than it would be in the case of an exhaustion requirement that is entirely judicial in origin, *id.* at 499-500; *Schulze Tool*, 564 F. Supp. at 1293. Administrative remedies need not be pursued when those remedies would be inadequate or inefficacious. *Aleknagik Natives*, 648 F.2d at 499. Nor need they be exhausted when exhaustion would be futile or when exhaustion would result in irreparable injury that immediate judicial review could prevent. *Id.* Finally, exhaustion is not required when the administrative proceeding would be void. *Id.*

None of these exceptions applies in this case. Given the elaborate framework established by Congress to guide the arbitrator, there is no reason to believe that the administrative remedy would be inadequate or inefficacious. See *Republic Industries, Inc. v. Central Penna. Teamsters Pension Fund*, 693 F.2d 290, 294-95 (3d Cir. 1982). Neither party faces any irreparable injury that only prompt judicial action can prevent. Whether exhaustion would be futile and whether the arbitral proceeding would be void are more complex questions requiring separate discussion.

It could be argued that arbitration would be futile because Concrete Pipe has mounted a facial challenge to the statute. *See Shelter Framing*, 705 F.2d at 1509 (futile to compel exhaustion when constitutional issues are to be resolved). Granting for purposes of this analysis that

Concrete Pipe's challenge to the MPPAA is in large measure facial, all the issues raised by Concrete Pipe would nonetheless be mooted by a factual determination in Concrete Pipe's favor. *Cf. id,* (arbitration would not eliminate assessed liability); *Republic Industries,* 693 F.2d at 296-97 (arbitration could not moot Republic's constitutional claims because arbitrator could not possibly find that Republic owed no money as a result of its withdrawal). Hence, the Court concludes that arbitration would be appropriate. In reaching this conclusion, the Court distinguishes *Peick v. Pension Benefit Guaranty Corp.,* 724 F.2d 1247 (7th Cir. 1983), on the grounds that the employer plaintiffs there (or their members, in the case of the organization plaintiffs) had withdrawn after the effective date of the MPPAA and so faced "actual injury" that required resolution of the constitutional issues. 724 F.2d at 1259. Similarly, the pension fund and fund trustees in *Peick,* unlike the instant trustees, had chosen *not* to assess withdrawal liability and so faced remedial action by the defendant Pension Benefit Guaranty Corp. 724 F.2d at 1260.

The Court's conclusion regarding futility makes it necessary to consider the possibility of void proceedings in arbitration and places in controversy Concrete Pipe's contention that compulsory arbitration under the MPPAA deprives it of its right to a trial by jury. The result of an administrative proceeding is a nullity if the proceeding was infected with fundamental procedural error. *Winterberger v. Teamsters Local 162,* 558 F.2d 923, 925 (9th Cir. 1977). Presumably, if Concrete Pipe had a right to a jury determination of the issues that the MPPAA initially commits to arbitration, the arbitral result would be void. The

conclusion that Concrete Pipe desires does not follow, however, because there is no constitutional infirmity in a congressional decision to vest factfinding in a tribunal other than a jury when, as in the case of the MPPAA, Congress creates "statutory public rights." *Textile Workers Pension Fund v. Standard Dye & Finishing Co.,* No. 83-7004 (2d Cir. Jan. 9, 1984); *Peick,* 724 F.2d at 1277; *Republic Industries,* 718 F.2d at 642.

Finally, there is no merit to the position advanced by Concrete Pipe that the MPPAA arbitration provisions do not apply to this dispute because the liability issue hinges on the timing of withdrawal. The Pension Trust has determined that Concrete Pipe withdrew after September 26, 1980. Thus, the instant dispute concerns liability under the MPPAA, notwithstanding Concrete Pipe's contention that it withdrew prior to the effective date. *See Schulze Tool,* 564 F. Supp. at 1289-90.

ORDER

Summary judgment is granted in favor of the Pension Trust with respect to the issue of the right to a jury trial. In all other respects the motion of the Pension Trust is denied without prejudice to its renewal at an appropriate juncture.

Concrete Pipe's motion for summary judgment is denied in its entirety. With the exception of that portion of the motion pertaining to the right to a jury trial, the motion is denied without prejudice to its renewal at an appropriate juncture.

The parties are ordered to submit to arbitration in accordance with the applicable provisions of ERISA as amended by the MPPAA.

The Court retains jurisdiction of these consolidated actions pending a timely motion to enforce, modify, or vacate the arbitrator's award.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: April 4, 1984

/s/ Malcolm M. Lucas
Malcolm M. Lucas
United States District Judge

American Arbitration Association

In the Matter of Arbitration)
)
Between)
)
CONSTRUCTION LABORERS PENSION)
TRUST FOR SOUTHERN CALIFORNIA)
)
and)
)
CONCRETE PIPE AND PRODUCTS)
COMPANY, INC.)
)
_____)

DECISION OF ARBITRATOR

Kenneth M. Schwartz
Arbitrator
141 South Linden Drive
Suite 203
Beverly Hills, CA 90212
Telephone: (213) 274-9734

I
The Proceedings

This arbitration hearing is being conducted pursuant to an order of the United States District Court for the Central District of California wherein Judge Malcolm Lucas ordered the parties to arbitrate the dispute existing between them. The issues in this matter have been bifurcated with the threshold question to be decided of whether the Company has a withdrawal liability in the first instance. It was understood and agreed that should it

be determined that the Company has incurred a withdrawal liability, then and in that event, the Company could, if it cared to do so, challenge the calculation of the amount of the liability in a subsequent hearing.

Counsel for the parties selected the undersigned to act as arbiter to resolve the dispute in accordance with the rules established by the American Arbitration Association.

Parties to the dispute are:

> Concrete Pipe and Products Company of California, herein called "Company," and Construction Laborers Pension Fund, herein called "Fund."

Appearing as legal counsel for the parties were:

> Dennis R. Murphy, Esq., of Diefenbrock [sic], Wulff, Plant & Hannegan, for the Company.
>
> Everett G. Beers, Esq., of Cox, Castle & Nicholson, for the Fund.

The hearing was held on June 25, 1987, in the offices of the American Arbitration Association at Los Angeles, California. A stenographic record was made of the proceeding by a Certified Shorthand Reporter. All witnesses testifying in this arbitration were sworn as was the Arbitrator.

Counsel for the parties were afforded a full and complete opportunity to enter into stipulations, both oral and written; present documentary evidence; examine and crossexamine witnesses; make arguments in support of their respective positions; and file opening and closing briefs.

In a document received in evidence as Joint Exhibit 2, the parties submitted in evidence a Joint Stipulation of Facts as well as opinions and orders from both the United States District Court and The Court of Appeals.

For the purpose of this proceeding, the Stipulation of Facts will not be repeated in *haec verba*, but reference will be made to facts relevant to the resolution of this matter. References may also be made to the District Court's comments as well, as they may be material.

II

The Factual Background

Prior to December 1, 1976, Cen-Vi-Ro, a manufacturer of concrete pipe in Shafter, California, and the Southern California District Council of Laborers, herein called "the Union," were signatories to a Collective Bargaining Agreement which, among other things, obligated the Employer to make payments to the Fund on behalf of employees covered by the Agreement.

On December 1, 1976, the Company, i.e., Concrete Pipe, acquired by purchase the Shafter, California, plant and took over the operation of the production of concrete pipe. As a result of the acquisition of the plant, the Company assumed the Collective Bargaining Agreement of its predecessor and continued to abide by its terms, including making contributions to the Fund.

In 1978, the Company and the Union entered into a new Agreement which, by its terms, required contributions to be made to the Fund for employees for hours worked at the Shafter facility. By its terms, the Agreement

was to remain in effect until June 30, 1981. It further provided for automatic renewal from year to year unless either the Union or the Company gave timely written notice of a desire to renegotiate its terms prior to June 30, 1981, or prior to June 30th of each subsequent year of the automatic renewal. It further provided that such written notice shall be given sixty (60) days prior to June 30, 1981, or subsequent June 30th of each year, and if no agreement was reached by June 30, 1981, or thereafter, the Employer or Union could give written notice to each other that on a " . . . specified date not less than fifteen (15) days after the date of said notice, the Agreement shall be considered terminated."

Up until August 1979, the Shafter plant was in full and continuous production of concrete pipe. In August 1979, the Company ceased its production of concrete pipe at Shafter. Further, it stopped purchasing materials; it laid off employees; and started removing machinery for shipment to its Sacramento plant. From October 1979 to the reopening of its plant in November 1981, only two employees worked at the Shafter plant, one of whom worked from October 1979 through December 1980, and the other worked from November 1979 to the reopening in November 1981. The last contribution made by the Company to the Fund was in May 1980.

Throughout the period of August 1979 through November 1981, the Company searched for additional work in the Shafter-Bakersfield area by sending its salesmen into the area on a regular basis.

In the latter part of 1981, the Company became a successful bidder on a project in the Bakersfield area,

known as Wheeler Ridge. As a result of such bidding, the Company was awarded two of the four contracts it bid on calling for the production of 7,000 tons of concrete pipe.

As a consequence of receiving the two contracts, the Company reopened its Shafter plant in November 1981 and employed persons within the classifications of laborers covered by the scope of the 1978-1981 Collective Bargaining Agreement.

In the Spring of 1981, and prior to the Company being awarded its newly bid upon contracts, both the Company and the Union sent timely notices to each other in accordance with their Agreement, giving notice to each other of their desire to negotiate a new bargaining agreement. Negotiations were conducted in October and November 1981. On November 30, 1981, the Company sent the Union a letter stating that the Company was withdrawing recognition of the Union and that an impasse in negotiations had been reached. Said notice sent to the Union of the Company's intended termination of the Agreement was pursuant to the notice provision of the Agreement and which would be effective as far as the date of termination was concerned no earlier than December 15, 1981.

III

The Factual Question to be Determined

In order to determine whether or not there is a withdrawal liability to the Fund by the Company, the determination of the status of the closing down of the Shafter plant is paramount.

Judge Malcolm Lucas phrased the question as follows:

> "Did Concrete Pipe permanently close its Shafter plant in 1979, as Concrete Pipe maintains, or did it, as the Pension Trust argues, simply 'mothball' the facility pending its relocation elsewhere in the Union's jurisdiction or pending an increase in business such as apparently occurred in 1981?"

IV

Contentions of the Parties

The Company contends that it is not liable for withdrawal liability because it effected a "complete withdrawal" when it closed its Shafter plant in August 1979 which date is prior to September 26, 1980, the effective date of MEPPA. It is the contention of the Company that the closure of the Shafter plant in August 1979 constituted a permanent cessation of covered operations as that term is defined in MEPPA; hence, the provisions as to withdrawal liability are not applicable to it. Further, the Company contends that Congress recognized the fact that a Company which had permanently ceased a covered operation could reopen at a later time when Congress provided for adjusting the withdrawal liability when such incident occurred (29 U.S.C. § 1387 of ERISA).

The Fund contends that 29 U.S.C. § 1381(a) requires a permanent cessation of covered operations before a "complete withdrawal" occurs and that the temporary idling of the plant in 1979 did not qualify as a complete withdrawal because the plant later went back into full production for a substantial period of time. Hence, the

Fund contends that a "complete withdrawal" did subsequently occur on December 15, 1981, the date the Company terminated its agreement with the Union and ended its obligation to contribute to the Fund.

V

Statement of the Law

The applicable provisions of the law are found in 29 U.S.C. § 1381, *et seq.*, which deal with withdrawal liabilities from multi-employer plans after September 26, 1980, and are as follows:

1. 29 U.S.C. § 1383(a) defines "complete withdrawal" as:

> "(a) For purposes of this Part, a complete withdrawal from a multi-employer plan occurs when an employer –
>
> "(1) permanently ceases to have an obligation to contribute under the plan, or
>
> "(2) permanently ceases all covered operations under the plan."

While there are certain modifications applicable to the Building and Construction Industry and the Entertainment industry, there was no contention made by either of the parties that said modifications were relevant here.

2. 29 U.S.C. § 1383(e) fixes the date that a complete withdrawal occurs as follows:

> "(e) For purposes of this part, the date of complete withdrawal is the date of cessation of

the obligation to contribute or the cessation of covered operations."

3. 29 U.S.C. § 1392(a) provides:

"(a) For purposes of this part, the term 'obligation to contribute' means an obligation to contribute arising –

"(1) Under one or more collective bargaining (or related) agreements or

"(2) As a result of a duty under applicable labor-management relations law, but does not include any obligation to pay withdrawal liability under this Section or to pay delinquent contributions . . . "

VI

Discussion

Counsel for the parties have no disagreement as to the facts nor have they any disagreement as to the applicable law involved.

The issue to be determined is whether or not the Company met the definition of "complete withdrawal" when it closed its plant in Shafter, California, in August 1979. Judge Lucas in posing the question simply asks the question of whether the closure in 1979 of the Shafter plant was permanent or merely a "mothballing" of the plant; in other words, a temporary situation.

Counsel for the Company notes that the facts presented strongly support the contention that the Company *intended* the closure to be of a permanent nature. In his argument to support his position further, counsel points out that attempts were made to relocate the plant and

also to negotiate out of the Company Lease, which counsel contends are facts consistent with the intention to permanently cease operations.

The dictionary definitions are not of a great deal of help in determining the issue here. While Webster's Dictionary does define "permanent" as "lasting indefinitely" and further Webster defines the word "indefinite" by using the term as having "no precise limits," nonetheless, Webster also defines "permanent" as "lasting *indefinitely without change*" (emphasis mine). Black's Law Dictionary defines "permanent" as *"fixed, continuing, lasting, stable, enduring, not subject to change* but *not necessarily perpetual* (emphasis mine). Frankly, the definitions do not resolve the issue, but simply lends itself to interpretations as to what length of time must elapse before a "temporary" closing becomes "permanent." The very fact that the word "indefinite" is defined in Webster's Dictionary as having "no precise limits" is indicative of the ambiguity which exists when trying to apply the strict definitions to the facts.

Needless to say, when making the determination as to whether a "complete withdrawal" has occurred, the test to be applied is an objective test. The expression of intent to withdraw is irrelevant to the determination of actual withdrawal. *IAM National Pension Fund Benefit Plan C v. Stockton TRI Industries*, 727 F.2d 1204 (DC C.A. 1984). Hence, the overt manifestation of the acts of the Company is the determining factor.

In the instant case, there were documents and testimony in support of the Company's contention that the closing in August 1979 was intended by the Company to

be a permanent closure. Notwithstanding the Company's intent, the plant was reopened for full production in November 1981 which negates a determination of permanent cessation of operations.

Both counsel have cited the case of the *United Food and Commercial Workers v. G. Bartusch Packing Co.*, 546 F.Supp. 852 (1982) in support of their respective positions. Accordingly, an analysis of the case is warranted.

In *Bartusch*, the Employer had shut down his operation prior to the effective date of MEPPA. At the time of the closure, all the employees were laid off indefinitely. It was conceded that the Employer intended the closure to be temporary in that he hoped to obtain appropriate financing to reopen the plant and resume operations. The Employer's attempts to obtain financing were unsuccessful and as a result thereof, the plant never reopened and the employees were never rehired.

The Pension Plan argued that since the Employer had not intended the closure to be permanent but in fact intended it to be temporary, the complete withdrawal had not occurred prior to the effective date of MEPPA; hence, a withdrawal liability was incurred.

The Court disagreed with the argument of the Pension Plan when it held that the intent of the Employer was irrelevant in determining whether a permanent cessation of covered operations occurred. The Court stated:

> "Regardless of its intention . . . the failure of the plant to ever reopen means that the initial closing was permanent" (*Id.*, at 857).

Counsel for the Fund in the instant case has relied on the *Bartusch* case in support of his argument that intent is immaterial and the cold facts are that the Company did reopen its plant for full production in November 1981.

On the other hand, counsel for the Company looks to the *Bartusch* case in support of his argument that a "permanent cessation of covered operations can occur even if an employer has the ability and even the intent to reopen."

In reading the *Bartusch (supra)* and *Stockton TRI Industries (supra)* cases, it appears convincingly to the undersigned that intent is irrelevant and the objective test to determine when the complete withdrawal has occurred is the standard to be used.

While there was considerable evidence to the effect that the Company had attempted to locate a new plant in the San Bernardino-Riverside area, nonetheless, there was also evidence to the effect that two employees worked at the Shafter location at such duties as acting as plant custodian, plant security and answering calls regarding the unsold inventory. Further, the Company renewed its Lease for an additional year. Still further, there is evidence that during the period of the closure from August 1979 to November 1981, salesmen were in the Shafter-Bakersfield area attempting to obtain orders for work.

Last, but not least, the fact that the Company bid on four (4) contracts and were awarded two (2) contracts for the production of concrete pipe resulting in the plant reopening and employing persons within the classifications of laborers covered by the scope of 1978 to 1981 is a

fact that cannot be ignored in imposing the objective test in determining when a complete withdrawal occurred.

Parenthetically, the fact that the Company gave notice to the Laborers' Union in the Spring of 1981 of its desire to renegotiate the Collective Bargaining Agreement for the Shafter plant is wholly inconsistent with the Company's position that there was a cessation of covered operations at the time the Shafter plant closed in August 1979.

VI

Conclusion

It is concluded, therefore, that based upon the objective facts and in answering the factual question raised by Judge Malcolm Lucas, it is found that:

> Concrete Pipe did not permanently close its Shafter plant in 1979 but simply "mothballed" the facility pending an increase in business as a result of which it reopened its plant and hired employees in classifications covered by the Labor Agreement. Accordingly, Concrete Pipe is liable under MEPPA for withdrawal liability.

Dated: August 26, 1987

/s/ Kenneth M. Schwartz
KENNETH M. SCHWARTZ
Arbitrator

(Certificate of Service Omitted in Printing)

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

No. 91-904

In The

Supreme Court of the United States

October Term 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
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Petition For Certiorari Filed December 3, 1991
Certiorari Granted May 26, 1992

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AMERICAN ARBITRATION ASSOCIATION,
ADMINISTRATOR

VOLUNTARY LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION BETWEEN:	
CONSTRUCTION LABORERS PENSION TRUST	NO. 72 621 001 87 MEPP
-AND-	
CONCRETE PIPE & PRODUCTS COMPANY	

THURSDAY, FEBRUARY 18, 1988
10:00 A.M.

443 SHATTO PLACE
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LOS ANGELES, CALIFORNIA
90020

THE ARBITRATOR: KENNETH M. SCHWARTZ, ESQ.
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TRIBUNAL
ADMINISTRATRIX: JEAN WILLAUER

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FILE NO.: 15-88

REPORTED BY: ROSEMARY HARRISON
CSR NO. 4798

APPEARANCES OF COUNSEL

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BY: JAMES M. NELSON, ESQ.
300 CAPITOL MALL
SEVENTEENTH FLOOR
SACRAMENTO, CALIFORNIA 95814

ALSO PRESENT:

FOR THE FUND: MAREL K. BATES
HERBERT J. KLEIN
DAN O. CONNELL

FOR THE COMPANY: JON L. KING

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* * *

[p. 139] MAREL K. BATES,

CALLED AS AN ADVERSE WITNESS BY THE COMPANY, HAVING BEEN PREVIOUSLY DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE ARBITRATOR: OFF THE RECORD.

(DISCUSSION HELD OFF THE RECORD.)

THE ARBITRATOR: LET'S GO BACK ON THE RECORD, PLEASE.

[p. 140] DIRECT EXAMINATION

BY MR. NELSON:

Q FIRST, MR. BATES, WE PROBABLY OUGHT TO HAVE YOU IDENTIFY YOURSELF. WOULD YOU STATE YOUR NAME, PLEASE?

A MY NAME IS MAREL BATES.

Q YOU'RE EMPLOYED BY THE MARTIN SEGAL COMPANY?

A THAT'S CORRECT.

Q THERE'S A DOCUMENT THAT'S BEEN PLACED INTO EVIDENCE THAT PURPORTS TO BE A RESUME OF YOURS.

MR. BEERS: TRUST NUMBER 5 IS WHAT YOU'RE LOOKING AT?

THE WITNESS: YES, THAT'S MY RESUME.

Q BY MR. NELSON: I GUESS BEFORE WE GET INTO THE NITTY-GRITTY OF THIS, I THINK ONE OF THE THINGS MR. BEERS MENTIONED I'LL ASK YOU ABOUT. I THINK YOU MENTIONED THAT MARTIN SEGAL HAS ABOUT 20 TO 30 PERCENT OF THE MARKET SHARE OF MULTI-EMPLOYER PENSION PLANS?

A I BELIEVE THAT'S CORRECT.

Q I TAKE IT THEN THAT YOU'VE TESTIFIED ON A NUMBER OF OCCASIONS ON BEHALF OF VARIOUS MULTI-EMPLOYER TRUST FUNDS IN WITHDRAWAL LIABILITY HEARINGS?

A YES.

Q DO YOU KNOW APPROXIMATELY HOW MAY TIMES?

[p. 141] A THREE OR FOUR.

Q WITH RESPECT TO THE ACTUARIAL TECHNIQUES OR PROCESSES THAT YOU USE IN A MULTI-EMPLOYER PLAN, DID THOSE PROCESSES OR TECHNIQUES VARY FROM THOSE THAT WOULD BE USED ON A NONMULTI-EMPLOYER PLAN?

A TO A LIMITED EXTENT, YES.

Q TO WHAT EXTENT WOULD THEY BE DIFFERENT?

A I ASSUME YOU MEAN PRIMARILY WITH RESPECT TO WITHDRAWAL LIABILITY?

Q YES.

A A NONMULTI-EMPLOYER PLAN WOULDN'T HAVE ANY WITHDRAWAL LIABILITY, EXCEPT LIABILITY POSSIBLY TO THE P.B.G.C., WHICH GUARANTEES BENEFITS FOR PLAN TERMINATIONS.

THE ASSUMPTIONS FOR MULTI-EMPLOYER PLANS TEND TO DIFFER SLIGHTLY FROM ASSUMPTIONS FOR PLANS WHOSE BENEFITS ARE RELATED TO SALARY, BECAUSE A PLAN WHOSE BENEFIT IS RELATED TO SALARY IS PARTIALLY INDEXED, YOU

MIGHT SAY, FOR INFLATION. AS A PERSON EARNS HIGHER SALARY TOWARDS HIS RETIREMENT YEARS THE BENEFIT INCREASE FOR THAT HIGHER VALUE OF SERVICE IS AUTOMATICALLY BUILT INTO THE PLAN'S FORMULA.

BUT A MULTI-EMPLOYER PLAN TYPICALLY, LIKE THIS PLAN, ITS BENEFIT MULTIPLIER IS A FLAT DOLLAR PER YEAR OF SERVICE FORMULA, WHICH IS FREQUENTLY INCREASED. SO THOSE INCREASES CANNOT BE FUNDED FOR [p. 142] IN ADVANCE UNDER I.R.S. RULES, BUT THEY ARE REAL AND THEY EXIST. AND THE WAY OF PARTIALLY FUNDING FOR THEM COMMON IN THE INDUSTRY IS TO USE A SLIGHTLY LOWER INTEREST ASSUMPTION FOR PLANS WHOSE BENEFITS ARE NOT RELATED TO SALARY.

Q WOULD THERE HAVE BEEN ANY OTHER DISTINCTIONS BETWEEN THE ACTUARIAL ASSUMPTIONS YOU USED FOR MULTI-EMPLOYER PLAN AND FOR A SINGLE EMPLOYER PLAN, OTHER THAN THOSE YOU'VE ALREADY TESTIFIED ABOUT?

A THE CRITICAL DIFFERENCE FOR ANY COLLECTIVELY BARGAIN PLAN, OR AT LEAST COLLECTIVELY BARGAIN PLANS WHOSE CONTRIBUTION RATES HAVE BEEN NEGOTIATED, IS A DIFFERENCE IN MOST SINGLE EMPLOYER PLANS. THE EMPLOYER HAS THE ABILITY TO CONTRIBUTE WHAT IT WANTS WITHIN THE MAXIMUM AND MINIMUM REQUIREMENTS OF LAW TO THE FUND DURING THE YEAR. BUT COLLECTIVELY BARGAIN PLAN LIKE THIS ONE, THE CONTRIBUTIONS ARE SET IN THE COLLECTIVE

BARGAINING PROCESS AND ARE NOT EASILY CHANGED THEREAFTER UNTIL THE NEXT ROUND OF COLLECTIVE BARGAINING, AND SOMETIMES NOT EVEN THEN.

Q WOULD THE PROCESS BY WHICH AN ACTUARY WOULD VALUE THE ASSETS CHANGE BETWEEN A MULTI-EMPLOYER PLAN AND A SINGLE EMPLOYER PLAN?

A NOT NECESSARILY.

Q WOULD THAT SAME SIMILARITY HOLD TRUE BY THE MANNER IN WHICH THE ACTUARY WOULD VALUE THE LIABILITY [p. 143] BETWEEN A MULTI-EMPLOYER PLAN AND A SINGLE EMPLOYER PLAN?

A THE LIABILITIES FOR WHICH PURPOSE? FOR THE PURPOSE OF WITHDRAWAL LIABILITY?

Q FOR PURPOSES OF ASSESSING WHAT THE PRESENT VALUE VESTED BENEFITS WOULD BE.

A IT WOULD DEPEND ON WHAT PURPOSE. THERE ARE A NUMBER OF PURPOSES FOR WHICH AN ACTUARY CALCULATES THE PRESENT VALUE OF VESTED BENEFITS. ON THE SINGLE EMPLOYER SIDE, YOU HAVE THE ANNUAL REPORTING ON SCHEDULE "B" OF FORM 5500, WHICH IS THE FUND'S ANNUAL REPORT TO THE GOVERNMENT. YOU ALSO HAVE ON THE SINGLE EMPLOYER SIDE REQUIREMENTS FOR DISCLOSURE FOR THE FINANCIAL ACCOUNTING STANDARDS BOARD'S STATEMENTS, 35 AND NOW 87, WHICH ARE ON A DIFFERENT SET OF ASSUMPTIONS USUALLY. FOR MULTI-EMPLOYER

PLANS, YOU HAVE WITHDRAWAL LIABILITY CALCULATIONS.

Q I NOTICE THAT MANY OF THE REPORTS IN JOINT EXHIBIT 7-A THROUGH -F SEEM TO BE AUTHORED BY A FELLOW BY THE NAME OF JAMES F. LAWS, L-A-W-S. DO YOU KNOW MR. LAWS?

A YES.

Q WHO IS HE?

A HE IS A SENIOR ACTUARY OF THE SEGAL COMPANY. HE WAS THE CHIEF ACTUARY IN THE LOS ANGELES OFFICE FROM 1977, ROUGHLY, TO 1984. FROM 1984 TO [p. 144] '86, HE CONTINUED AS A SENIOR ACTUARY IN THE LOS ANGELES OFFICE AFTER I HAD BEEN NAMED THE HEAD OF THE ACTUARIAL DEPARTMENT. THAT CHANGE WAS DUE PRIMARILY TO HIS RESPONSIBILITIES, WHICH INCREASINGLY REQUIRED HIM TO BE OUT OF THE OFFICE AS A CONSULTANT. SINCE 1986 HE HAS BEEN THE HEAD OF THE MARTIN SEGAL COMPANY'S NORTHEASTERN ACTUARIAL DEPARTMENT LOCATED IN BOSTON.

Q MR. LAWS IS STILL WITH MARTIN E. SEGAL COMPANY?

A THAT IS CORRECT.

Q I WANT TO MAKE SURE THAT WE'RE ALL OPERATING FROM THE SAME OPERATIVE NEXUS OF TERMINOLOGY HERE TO THE EXTENT WE CAN, SO I'M GOING TO TRY OUT SOME DEFINITIONS ON YOU TO SEE IF A LAWYER'S DEFINITION IS PRETTY CLOSE TO AN ACTUARY'S, IF I MIGHT.

THE TERM "MARKET VALUATION" HAS BEEN USED, OR FOR MARKET VALUE AS IT RELATES TO ASSETS HAS BEEN USED IN A COUPLE OF OCCASIONS IN THE REPORTS IN JOINT EXHIBIT 7. WOULD MARKET VALUATION REFER TO THE AMOUNT THAT THE ASSET WOULD BRING IF SOLD ON THE MARKET IMMEDIATELY?

MR. BEERS: OBJECTION. IF YOU'RE REFERRING TO A PARTICULAR PLACE, IT MIGHT HAVE DIFFERENT MEANINGS. ARE YOU REFERRING TO A PARTICULAR PLACE IN THOSE DOCUMENTS?

[p. 145] MR. NELSON: I WASN'T. I WAS TRYING TO GO FOR A GENERAL DEFINITION.

MR. BEERS: IT'S JUST THAT YOU PREFACED IT WITH A PARTICULAR REFERENCE TO IT BEING IN DOCUMENTS. I'M SURE THERE ARE LOTS OF DIFFERENT DEFINITIONS OF MARKET VALUE THAT A PERSON COULD COME UP.

Q BY MR. NELSON: I GUESS THE TERM "MARKET VALUE" IS APPLIED TO ASSETS OF THE TRUST.

THE ARBITRATOR: DOES THAT HELP YOUR OBJECTION?

MR. BEERS: IF THE WITNESS UNDERSTANDS THE QUESTION.

THE WITNESS: THE MARKET VALUE ASSETS FOR ALL PURPOSES FOR THE TRUST IS THE SAME AS OF A PARTICULAR POINT IN TIME, AND IT'S CALCULATED BY THE ACCOUNTANTS AND THEIR AUDITORS GENERALLY. AND IT IS OBTAINED, FOR THE MOST PART, BY TAKING THE DECEMBER 31 CLOSING

QUOTATIONS ON THE NEW YORK STOCK EXCHANGE, THE BOND EXCHANGE, AND SO ON AND SO ON, FOR THE KINDS OF ASSETS THEY HOLD, PLUS APPRAISED VALUE OF REAL ESTATE.

Q BY MR. NELSON: WE'RE TALKING THEN ESSENTIALLY ABOUT WHAT THE ASSET WOULD BRING IF PUT ON THE MARKET AT ANY GIVEN POINT IN TIME?

A YES. THE NECESSITY IF YOU SELL A LARGE BLOCK OF STOCKS, THAT SALE ITSELF MAY DEPRESS THE PRICE SOMEWHAT, BUT OTHER THAN THAT –

[p. 146] MR. BEERS: YOU'RE SAYING THAT'S NOT INCLUDED.

THE WITNESS: THAT'S NOT REFLECTED IN THAT FACTOR, YES.

MR. BEERS: THANK YOU.

Q BY MR. NELSON: THERE ARE ALSO REFERENCES TO ASSUMPTIONS IN SOME OF THE ACTUARIAL REPORTS AS BEING EITHER LIBERAL OR CONSERVATIVE. FIRST OF ALL, I GUESS WOULD THE ADJECTIVE LIBERAL OR CONSERVATIVE DIFFER DEPENDING UPON WHAT ASSUMPTION YOU WERE APPLYING IT TO IN TERMS OF WHEN IT WOULD TEND TO INCREASE WITHDRAWAL LIABILITY OR DECREASE WITHDRAWAL LIABILITY?

A FOR ACTUARIAL PURPOSES, THE TERM "CONSERVATIVE" GENERALLY REFERS TO FUNDING METHODS, ASSUMPTION VALUATION METHODS, ET CETERA, WHICH CAUSE MORE OF THE ACTUAL CALCULATED COST OF THE PLAN TO BE ASSIGNED

TO THE CURRENT PERIOD AND PRIOR PERIODS AND RELATIVELY LESS TO FUTURE PERIODS. WHICH MEANS THE LIABILITY AT A PARTICULAR POINT IN TIME UNDER A MORE CONSERVATIVE ASSUMPTION FUNDING METHOD, ET CETERA, WOULD BE HIGHER IF THAT ASSUMPTION, ET CETERA, WERE MORE CONSERVATIVE, AND IT WOULD BE LOWER IF IT WAS LESS CONSERVATIVE.

THE WORD "LIBERAL" IS USED FOR SO MANY DIFFERENT CONFUSING THINGS THAT I WILL TRY TO AVOID USING IT, AND THING'S MORE CONSERVATIVE OR LESS [p. 147] CONSERVATIVE.

Q ALL RIGHT. WITH RESPECT TO JOINT EXHIBIT 7 –

THE ARBITRATOR: THAT'S THIS ONE (INDICATING).

Q BY MR. NELSON: I GUESS "C," WHICH WOULD BE THE MARCH 23, 1983 MEMORANDUM REGARDING WITHDRAWAL LIABILITY. TO YOUR KNOWLEDGE, DID THE BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA ADOPT OR INCORPORATE YOUR RECOMMENDATIONS INTO THEIR STATED FUND PRACTICES FOR CALCULATING WITHDRAWAL LIABILITY?

A MY UNDERSTANDING IS THAT THEY DID.

Q WOULD THE SAME HOLD TRUE FOR EXHIBIT 7-D, WHICH IS A REPORT ON WITHDRAWAL LIABILITY DATED JANUARY 1, 1982?

A YES.

MR. NELSON: COULD YOU READ BACK THE QUESTION TO ME?

(RECORD READ AS FOLLOWS:

"QUESTION: WOULD THE SAME HOLD TRUE FOR EXHIBIT 7-D, WHICH IS A REPORT ON WITHDRAWAL LIABILITY DATED JANUARY 1, 1982?

"ANSWER: YES.")

MR. NELSON: AND THE QUESTION THAT REFERS TO.

(RECORD READ AS FOLLOWS:

"I GUESS "C" WOULD BE THE MARCH 23, [p. 148] 1983 MEMORANDUM REGARDING WITHDRAWAL LIABILITY. TO YOUR KNOWLEDGE, DID THE BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA ADOPT OR INCORPORATE YOUR RECOMMENDATIONS INTO THEIR STANDARD FUND PRACTICES FOR CALCULATING WITHDRAWAL LIABILITY?

"ANSWER: MY UNDERSTANDING IS THAT THEY DID.")

Q BY MR. NELSON: I GUESS, MR. BATES, I OUGHT TO CORRECT MYSELF. I USED THE TERM "YOUR." I UNDERSTAND THAT THOSE ARE THE MARTIN SEGAL COMPANY RECOMMENDATIONS IN EXHIBIT "C" AND "D." JUST TO MAKE THE RECORD CLEAR, I WASN'T TRYING TO ATTRIBUTE THEM TO YOU PERSONALLY.

A YES, THANK YOU.

Q HAVE YOU REVIEWED THE DEMOGRAPHIC ASSUMPTIONS WHICH THE PLAN USES IN DETERMINING THE ACTUARIAL VALUATION FOR 1980?

A YES.

Q WHEN YOU PERFORMED THAT REVIEW, DID YOU REVIEW EACH INDIVIDUAL ASSUMPTION OR DID YOU REVIEW THE ASSUMPTIONS IN THE AGGREGATE?

A I REVIEWED THE ASSUMPTIONS IN THE AGGREGATE. YOU MUST REMEMBER THAT THIS REVIEW TOOK PLACE RECENTLY, SINCE I WAS NOT THE ACTUARY AT THAT TIME.

[p. 149] Q WITH RESPECT TO THE DEMOGRAPHIC ASSUMPTIONS IN THE 1980 ACTUARIAL REVIEW, CAN YOU DETERMINE BY EXAMINING EACH OF THE DEMOGRAPHIC ASSUMPTIONS WHETHER THEY ARE INDIVIDUALLY CONSERVATIVE OR INDIVIDUALLY MORE LIBERAL?

A REFERRING TO EXHIBIT "E," THE VALUATION AND REVIEW AS OF THE APPROPRIATE DATE.

MR. BEERS: AS COMPARED TO WHAT? YOU'RE SAYING WHETHER THEY'RE CONSERVATIVE OR LIBERAL. DOES IT NEED TO BE COMPARED TO SOMETHING?

MR. NELSON: THANK YOU. LET'S DO IT THIS WAY.

Q WHAT WOULD BE THE DEMOGRAPHIC ASSUMPTIONS IN EXHIBIT "E"?

A THE ONES THAT ARE RELEVANT TO WITHDRAWAL LIABILITY ARE THE – ARE LISTED IN EXHIBIT 2 TOWARD THE BACK.

Q THAT'S EXHIBIT 2 OF JOINT EXHIBIT 7-E?

A YES. THE MORTALITY TABLES FOR NONDISABLED AND DISABLED LIVES, THE RETIREMENT AGE, AND A COUPLE OF ASSUMPTIONS THAT HAVE TO DO WITH INCOMPLETE DATA IS AN ASSUMPTION WITH RESPECT TO EMPLOYEES WITH UNKNOWN BIRTHDATES, AND AN ASSUMPTION WITH RESPECT TO YEARS OF UNRECORDED PAST SERVICE CREDIT.

Q ARE EACH OF THOSE DEMOGRAPHIC ASSUMPTIONS REASONABLE INDIVIDUALLY?

A THEY ARE REASONABLE INDIVIDUALLY IN MY [p. 150] OPINION. THE MORTALITY TABLE, IN PARTICULAR, IS – IS CERTAINLY NONCONSERVATIVE, AND IT WAS CHANGED SHORTLY AFTER THIS REPORT. AND IT WAS CHANGED AGAIN LATER IN THE DIRECTION OF MORE CONSERVATISM.

Q WITH RESPECT TO THE ECONOMIC ASSUMPTIONS WHICH WOULD HAVE AN IMPACT ON WITHDRAWAL LIABILITY, CAN YOU TELL US WITH RESPECT TO EXHIBIT "E" WHAT THE ECONOMIC ASSUMPTIONS BY CATEGORY WOULD BE?

A THE ONLY ECONOMIC ASSUMPTIONS ARE THE ASSET VALUE AND THE NET INVESTMENT RETURN THAT RELATE TO WITHDRAWAL LIABILITY, HOWEVER YOU TREAT ADMINISTRATIVE EXPENSES.

Q IN YOUR OPINION, IS THE ASSET VALUATION VIEWED IN ITS OWN RIGHT ISOLATED FROM THE OTHER ECONOMIC ASSUMPTIONS REASONABLE?

A WELL, IN EXHIBIT 2 WE HAVE TWO ASSET VALUATION METHODS. THE ONE THAT'S DESCRIBED UNDER THE CATEGORY "ASSET VALUATION," DESCRIBES AN ADJUSTED METHOD WHOSE OBJECTIVE IS TO SMOOTH INVESTMENT GAINS AND LOSSES, AND, THEREFORE, SCHEDULED COST TO THE PLAN. THAT WAS NOT USED FOR THE WITHDRAWAL LIABILITY, BUT RATHER THE MARKET VALUE INVESTMENTS WAS USED, WHICH IS DESCRIBED LOWER ON THAT PAGE. DID I ADDRESS YOUR QUESTION?

Q I DON'T THINK SO. IS THAT ASSET VALUATION THAT YOU JUST DESCRIBED AS BEING AN ADJUSTED METHOD [p. 151] TO SMOOTH INVESTIGATING LOSSES REASONABLE IN ITS OWN RIGHT?

A THAT'S A REASONABLE WAY TO VALUE ASSETS FOR THE ONGOING ACTUARIAL VALUATIONS OF THE PLAN.

Q YOU MENTIONED THERE WAS ANOTHER ASSET VALUATION, I THINK ON THE SAME PAGE THAT YOU WERE REFERRING TO, THAT HAD THE METHOD FOR ADJUSTING, TO SMOOTH OUT THE INVESTMENT GAINS AND LOSSES. WHAT ASSET VALUATION ARE YOU REFERRING TO?

A THAT'S SIMPLY TO USE THE MARKET VALUE.

Q IS THE USE OF THE MARKET VALUE ASSUMPTION REASONABLE IN ITS OWN RIGHT?

A YES.

Q WOULD YOU CONSIDER BOTH OF THE ASSET VALUATION ASSUMPTIONS THAT YOU'VE JUST DESCRIBED TO BE CONSERVATIVE?

A NEITHER IS INHERENTLY CONSERVATIVE OR NONCONSERVATIVE.

THE ARBITRATOR: I DIDN'T GET THAT.

THE WITNESS: I SAID NEITHER IS INHERENTLY CONSERVATIVE OR NONCONSERVATIVE.

Q BY MR. NELSON: WITH RESPECT TO THE INVESTMENT RETURN, ECONOMIC ASSUMPTION, IS IT YOUR OPINION THAT THAT RETURN IS REASONABLE ON ITS OWN RIGHT - EXCUSE ME, LET ME REPHRASE THE QUESTION.

WITH RESPECT TO THE INVESTMENT RETURN [p. 152] ECONOMIC ASSUMPTION AS IT RELATES TO WITHDRAWAL LIABILITY -

MR. BEERS: TO USE THE EXACT TERMS IN THE REPORT THAT WE'VE BEEN REFERRING TO, YOU MEAN THE NET INVESTMENT RETURN?

MR. NELSEN: I BELIEVE THAT'S CORRECT.

Q IS THE NET INVESTMENT RETURN ASSUMPTION REASONABLE IN ITS OWN RIGHT?

Q YES, THE SIX-PERCENT ASSUMPTION IS REASONABLE FOR THE PURPOSE FOR WHICH IT IS USED. THE INVESTMENT RETURN ASSUMPTION USED FOR

CALCULATION OF WITHDRAWAL LIABILITY IS INDICATED ON PAGE 3 OF EXHIBIT 2, AND HAS BEEN ALREADY DESCRIBED BY BOTH COUNSEL.

Q YOU MENTIONED ANOTHER ECONOMIC ASSUMPTION THAT HAD TO DO WITH ADMINISTRATIVE EXPENSES. CAN YOU TELL US WHERE THAT'S LOCATED IN EXHIBIT 7-E?

A IT'S IN THE MIDDLE OF PAGE 2 OF EXHIBIT 7-E, FOR PURPOSES OF THE ONGOING VALUATION OF THE PLAN. HOWEVER, FOR PURPOSES OF WITHDRAWAL LIABILITY, THE ADMINISTRATIVE EXPENSES, WHICH FOR THE RECORD WERE PROJECTED TO BE ONE MILLION TWO HUNDRED THOUSAND IN 1981, THOSE ADMINISTRATIVE EXPENSES ARE NOT INCLUDED EXPLILCITLY IN THE CALCULATION OF WITHDRAWAL LIABILITY. RATHER, THEY ARE REFLECTED IMPLICITLY BY USING INTEREST ASSUMPTIONS LOWER THAN WHAT ONE [p. 153] ACTUALLY EXPECTS THE FUND TO YIELD.

Q WITH RESPECT TO THE ECONOMIC ASSUMPTION COVERING ADMINISTRATIVE EXPENSES, IS IT YOUR OPINION THAT THE ASSUMPTION USED IN JOINT EXHIBIT 7-E THAT YOU'VE JUST BEEN DESCRIBING IS REASONABLE IN ITS OWN RIGHT?

A YES.

Q MR. BATES, AS WE DEAL IN THIS DAY OF THE HEARING WITH WHETHER A PARTICULAR ACTUARIAL ASSUMPTION IS REASONABLE OR NOT, IS IT

FAIR TO SAY THAT THERE IS A RANGE OF REASONABLENESS AS APPLIED TO ANY GIVEN ACTUARIAL ASSUMPTION?

A PRECISELY. AND TO THE COMBINATION OF ASSUMPTIONS.

Q TO THE BEST OF YOUR KNOWLEDGE, DO THE INDIVIDUAL ACTUARIAL ASSUMPTIONS USED FOR THE 1980 VALUATION REVIEW, WHICH I BELIEVE IS EXHIBIT 7-E, REFLECT THAT EACH OF THE INDIVIDUAL ASSUMPTIONS USED IS REASONABLE IN ITS OWN RIGHT?

MR. BEERS: CAN YOU RESTATE THE QUESTION SO I CAN GET THE FULL CONTEXT OF IT, OR MAYBE READ IT BACK?

MR. NELSON: WHY DON'T I RESTATE IT.

MR. BEERS: ALL RIGHT.

Q BY MR. NELSON: IN USING THE ACTUARIAL ASSUMPTIONS IN EXHIBIT 7-E, IS IT MARTIN SEGAL'S PRACTICE TO USE ONE LESS CONSERVATIVE ASSUMPTION TO [p. 154] OFFSET A MORE CONSERVATIVE ASSUMPTION FOR PURPOSES OF ARRIVING AT A SET OF ASSUMPTIONS THAT ARE REASONABLE IN THE AGGREGATE?

A TO SOME EXTENT, YES.

Q TO WHAT EXTENT?

A WELL, THE MORTALITY TABLE THAT WE USE GENERALLY IS REFLECTIVE OF MORTALITY

EXPECTED IN THE VERY NEAR FUTURE FOR PENSIONERS ON THE ROLLS. BUT WE KNOW THAT MORTALITY IMPROVEMENT CONTINUES, AND THE NONCONSERVATISM OF NOT ANTICIPATING MORTALITY IMPROVEMENTS IS OFFSET TO SOME EXTENT, NEVER STATED BY SOME CONSERVATISM IN THE NET INVESTMENT RETURN.

Q LET ME DIRECT YOUR ATTENTION TO JOINT EXHIBIT 7-E. TOWARDS THE END OF THAT EXHIBIT THERE'S AN ACTUARIAL VALUATION CERTIFICATE DATED APRIL 10, 1981, AND I WANT TO SPECIFICALLY DIRECT YOUR ATTENTION TO EXHIBIT 2 OF THAT ACTUARIAL VALUATION CERTIFICATE. CAN YOU FIND THAT?

A YES.

MR. BEERS: I HAVEN'T FOUND THE RIGHT PLACE.

THE ARBITRATOR: YOU'RE STILL TALKING ABOUT EXHIBIT "E," AREN'T YOU?

THE WITNESS: YES.

THE ARBITRATOR: I'LL FIND IT.

(BRIEF PAUSE.)

THE ARBITRATOR: GO AHEAD.

[p. 155] Q BY MR. NELSON: SPECIFICALLY AT THE TOP OF PAGE 2 OF EXHIBIT 2, THERE'S A REFERENCE TO AMOUNT OF UNRECORDED PAST SERVICE CREDIT FOR NONRETIRED PARTICIPANTS. CAN YOU FIND THAT?

A YES.

Q ARE YOU AWARE OF A STUDY THAT MARTIN SEGAL HAS CONDUCTED TO DETERMINE THE DATA THAT'S CONTAINED IN THAT PARTICULAR TABLE?

A YES.

Q WHAT IS THAT STUDY?

A THERE WAS A STUDY CONDUCTED SHORTLY AFTER WE BECAME THE ACTUARIES FOR THE FUND, AGAIN, WHEN WE OBSERVED THAT RETIREES WERE SHOWING UP WITH BENEFITS GREATER THAN WAS PROJECTED, BASED ON THE CENSUS DATA FROM THE YEAR BEFORE. AND WE INVESTED THE SITUATION AND DISCOVERED THAT MANY, OR PERHAPS A GREAT NUMBER OF PARTICIPANTS, HAD NO RECORDED PAST SERVICE CREDIT, AND THIS WAS THE EXPLANATION FOR THIS FACTOR.

SO WE ASKED THE THEN ADMINISTRATORS OF THE PLAN, A FIRM CALLED U.S. ADMINISTRATORS, TO COLLECT A SAMPLE OF RECORDS, TO EXAMINE THOSE RECORDS FOR THE INITIATION DATE IN THE UNION, AND THE AMOUNT OF PAST SERVICE CREDITS THAT WERE SHOWN. AND COMPARING THE INITIATION DATE IN THE UNION WITH THE FIRST PLAN YEAR OF THE PLAN, WHICH WAS 1962 FOR THE MAJORITY OF PEOPLE, THEY CALCULATED WHAT WAS THE MAXIMUM NUMBER [p. 156] OF YEARS OF PAST SERVICE THAT THESE INDIVIDUALS COULD HAVE HAD IF THEY HAD SATISFIED THE REQUIREMENTS FOR EARNING PAST SERVICE.

AND I – AS I SIT HERE, I'M NOT EXACTLY SURE WHAT THE RULES ARE, BUT THEY ARE USUALLY VERY GENEROUS. I THINK THE RULES USUALLY ARE THAT YOU GOT A YEAR OF PAST SERVICE CREDIT IF YOU WORKED OR COULD VERIFY THAT YOU WORKED EIGHT HOURS DURING THE YEAR IN COVERED EMPLOYMENT, AND IF YOUR UNION MEMBERSHIP REMAINED IN FORCE, PROVIDED, UNDER THE PLAN, THAT YOU THEN WORKED AT LEAST A TOTAL OF 700 HOURS DURING THE PERIOD 1962 TO 1967. THAT, I THINK, IS THE REQUIREMENT FOR HAVING PAST SERVICE CREDIT.

SO U.S. ADMINISTRATORS PROVIDED A SURVEY, I BELIEVE THE NUMBER OF RECORDS WAS 469 RECORDS, AND EXAMINED THE NUMBER OF PAST SERVICE CREDITS FOR THOSE RECORDS THAT APPEARED TO BE MISSING. AND THEN THIS 543,321 THAT YOU SEE IN EXHIBIT 2 WAS OUR EFFORT TO REPRODUCE WITH A MECHANICAL RULE WHAT THEY HAD DISCOVERED WITH THEIR SAMPLING TECHNIQUE.

WE CALCULATED THE AVERAGE NUMBER OF YEARS, APPARENTLY MISSING FOR EACH OF THESE YEAR BIRTH GROUPS, REDUCE THEM A LITTLE TO ALLOW, BECAUSE THE CALCULATION WAS FOR THE MAXIMUM NUMBER OF YEARS THAT THEY COULD HAVE HAD, SO WE REDUCED THE RESULTS SLIGHTLY, AND CAME UP WITH THESE – THESE ASSUMPTIONS [p. 157] WITH RESPECT TO PAST SERVICE CREDIT. SINCE THAT TIME THESE AMOUNTS HAVE BEEN INCLUDED IN THE CENSUS DATA THAT'S PROVIDED TO US BY OUR INSTRUCTION, BY

THE PLAN ADMINISTRATOR, ALWAYS WITH THE PROVISO THAT THESE ARE NOT APPLIED UNLESS THE INDIVIDUAL HAD AT LEAST 700 HOURS IN THE PERIOD 1962 TO 1967.

Q FIRST OF ALL, IS THE TABLE THAT'S AT THE TOP OF PAGE 2 OF EXHIBIT 2 TOWARDS THE END OF JOINT EXHIBIT 7-E, DOES THAT TABLE REPRESENT SOME SORT OF ACTUARIAL ASSUMPTION THAT MARTIN SEGAL HAS MADE?

A YES. I WOULD TEND TO CALL IT AN ASSUMPTION WITH RESPECT TO INCOMPLETE DATA, BUT THE ACTUARIES MADE IT BASED ON THIS SURVEY THAT I DESCRIBED.

Q SO THAT EACH PARTICIPANT WHO WAS BORN DURING THE YEARS 1912 TO 1916 IS PRESUMED TO CARRY FIVE ADDITIONAL YEARS OF UNRECORDED CREDIT AS VESTED CREDIT FOR PURPOSES OF THE TOTAL AGGREGATE AMOUNT OF VESTED LIABILITIES?

MR. BEERS: I BELIEVE THERE'S A SECOND REQUIREMENT TOO.

THE WITNESS: LET ME HANDLE THIS.

MR. BEERS: SURE.

THE WITNESS: IF HE HAS NOT RETIRED OR IF HE WORKED THE 700 HOURS DURING THE PERIOD 1962 TO 1967 AND DID NOT SUBSEQUENTLY INCUR PERMANENT BREAK, THAT WOULD HAVE CANCELED ALL OF HIS SERVICE.

[p. 158] Q BY MR. NELSON: I GUESS WITH THOSE QUALIFICATIONS, THE ANSWER IS, YES?

A YES.

Q AND THOSE YEARS OF UNRECORDED CREDITS ARE PLACED IN THERE BECAUSE THE RECORDS AREN'T ADEQUATE TO DETERMINE PRECISELY HOW MANY YEARS OF PAST SERVICE CREDIT THE PARTICIPANT WOULD HAVE?

A THAT'S CORRECT. THE RECORDS ARE QUITE POOR WITH RESPECT TO PAST SERVICE CREDIT. THIS IS NOT THOROUGHLY UNHEARD OF IN LARGE MULTI-EMPLOYER PLANS.

Q WITH RESPECT TO THE DISTINCTIONS BETWEEN INDIVIDUALS BORN BETWEEN 1912 AND 1916 AND THOSE INDIVIDUALS BORN BETWEEN 1917 AND 1921, IS THERE ANY STUDY THAT YOU'RE AWARE OF TENDING TO ESTABLISH THAT PARTICIPANTS OF THIS FUND BORN IN THOSE TWO AGE GROUPINGS WOULD TEND TO HAVE THE DIFFERENCE IN UNRECORDED PAST SERVICE CREDITS REFLECTED IN THE TABLE?

A YES. THAT WAS THE RESULT OF THE SURVEY THAT I INDICATED FROM U.S. ADMINISTRATORS.

Q YOU SAID THAT SURVEY WAS DONE SHORTLY AFTER YOU BECAME ACTUARIES FOR THE FUND AGAIN. WHAT YEAR WAS THAT?

A THE SURVEY WAS DONE AS OF DECEMBER 31, 1976.

[p. 159] Q WERE THERE ANY ADDITIONAL SUBSEQUENT SURVEYS PERFORMED?

A NOT UNTIL YESTERDAY WHEN I LOOKED AT A FEW INDIVIDUAL RECORDS AND DETERMINED THAT THE SAME ASSUMPTION STILL SEEMS TO BE REASONABLE. I LOOKED AT A MUCH SMALLER SAMPLE.

Q WITH RESPECT TO THE ORIGINAL SURVEY TAKEN BY U.S. ADMINISTRATORS, ARE YOU AWARE OF ANY GUIDELINES THAT MARTIN SEGAL GAVE TO THE ADMINISTRATOR TO ASSIST THE ADMINISTRATOR IN DETERMINING THE SAMPLE SIZE?

A NO.

Q WERE ANY INSTRUCTIONS, TO THE BEST OF YOUR KNOWLEDGE, GIVEN ON ENSURING THAT THE SAMPLE TAKEN WOULD BE STATISTICALLY SIGNIFICANT?

A I'M NOT AWARE OF IT. I DIDN'T DIRECT THE SURVEY, BUT MY SENSE OF IT IS THAT THE NUMBER OF RECORDS, WHICH I BELIEVE WAS 469, WAS STATISTICALLY SIGNIFICANT FOR THE NUMBER OF PEOPLE WE'RE TALKING ABOUT.

Q WAS THERE A WRITTEN REPORT GENERATED REGARDING THIS SURVEY?

A THE ONLY WRITTEN REPORT I CAN THINK OF WAS THE INSTRUCTIONS TO THE ADMINISTRATOR IN THE FUTURE TO LOAD THESE – THESE AMOUNTS INTO THE PAST SERVICE RECORDS THAT WERE BEING PROVIDED TO US FOR VALUATION PURPOSES.

[p. 160] Q THESE AMOUNTS ARE LOADED INTO THE PAST SERVICE RECORDS NOT ONLY FOR COMPUTING THE NUMBER OF CREDITS, BUT ALSO FOR VESTING PURPOSES, ARE THEY NOT?

A YES, BUT THAT ISN'T TERRIBLY SIGNIFICANT.

Q WITH RESPECT TO THE NUMBER OF CREDITS LOADED IN, IF YOU HAD AN INDIVIDUAL WHO DID NOT HAVE SUFFICIENT YEARS OF SERVICE CREDIT TO VEST PRIOR TO APPLICATION OF THIS UNRECORDED PAST SERVICE CREDIT ASSUMPTION, YOU COULD HAVE INDIVIDUALS WHO WOULD BE UNVESTED, YET SHOW UP ON THE ROLLS AS VESTED EMPLOYEES AFTER THIS UNRECORDED PAST SERVICE CREDIT WAS APPLIED?

A WHEN YOU SAY UNVESTED, YOU MEAN, UNVESTED WITHOUT KNOWLEDGE OF THEIR PAST SERVICE CREDITS?

Q CORRECT.

A I MEAN, IF THEY HAD THEIR PAST SERVICE CREDITS, THEY WOULD BE VESTED. THERE COULD BE A FEW, BUT YOU HAVE TO REMEMBER THAT THIS IS A PERIOD 15 YEARS BEFORE THE VALUATION, WHICH WAS DECEMBER 31, '76. AND WE'RE TALKING ABOUT SERVICE PRIOR TO '62. SO THE MAJORITY OF PEOPLE WHO WERE STILL IN THE CENSUS AS OF DECEMBER '76, EITHER EARNED TEN YEARS OF SERVICE DURING THE PERIOD '62 TO '76, THAT'S A 15-YEAR PERIOD, OR ELSE THEY WERE GONE. SO THAT ADDING VESTING CREDITS, FOR THE MOST PART YOU WOULD [p. 161] BE ADDING TO A

NUMBER WHICH IS ALREADY GREATER THAN TEN, WHICH IS THE ONLY NUMBER THAT MATTERS.

Q THAT LAST ANSWER IS YOUR ASSUMPTION THAT YOU WOULD BE ADDING CREDITS ONTO PEOPLE WHO ARE ALREADY VESTED?

A IT'S - IT'S MY STATEMENT THAT THE MAJORITY OF PEOPLE TO WHOM VESTING SERVICE CREDITS WERE ADDED, WERE ALREADY VESTED.

Q YOU SAID THE MAJORITY OF PEOPLE WERE ALREADY VESTED. IS THERE ANY STUDY WHICH WOULD SUPPORT THAT CONCLUSION?

A I DON'T KNOW OF A WRITTEN STUDY, BUT IF YOU - I'VE NO DOUBT THAT IF YOU LOOK AT INDIVIDUALS WITH INITIATION DATES PRIOR TO 1962, AND THAT'S WHEN WE'RE TALKING ABOUT HERE, WHO ARE STILL ON THE RECORDS OF THE FUND AND ACTIVE IN 1976, RATHER FEW OF THEM WOULD FAIL TO HAVE TEN YEARS OF VESTING SERVICE.

Q PUTTING ASIDE THE VESTING ISSUE FOR A MOMENT, THESE ADDITIONAL CREDITS FOR YEARS OF UNRECORDED SERVICE ARE ESSENTIALLY A FACTOR THAT YOU LOAD IN TO ACCOUNT FOR THE FACT THAT WE DON'T KNOW HOW MANY YEARS OF CREDIT THEY'VE EARNED IN THE PAST?

A THAT'S CORRECT.

Q I TAKE IT, THEN, THAT THE VALUE OF THESE YEARS OF UNRECORDED SERVICE CREDITS WOULD ALSO CARRY [p. 162] FORWARD AND WOULD APPEAR IN ANY UNFUNDED LIABILITY POOLS?

A OF COURSE.

Q A MOMENT AGO YOU MENTIONED A LESS CONSERVATIVE ASSUMPTION REGARDING MORTALITY WOULD TEND TO OFFSET A MORE CONSERVATIVE ASSUMPTION REGARDING THE INTEREST RATE. CAN YOU QUANTIFY WHAT KIND OF PERCENTAGES OF OFFSET YOU'RE TALKING ABOUT?

A NOT – NOT EASILY, NOT ACCURATELY, NOT AS I SIT HERE.

MR. BEERS: ANOTHER QUESTION, ARE YOU TALKING THE ABSTRACT OR ARE YOU TALKING ABOUT THE TRUST HERE? YOU SAID IT IN GENERAL TERMS.

MR. NELSON: I DID SAY IT IN GENERAL TERMS. I'LL TAKE THAT AS AN OBJECTION AND REPHRASE THE QUESTION.

MR. BEERS: SURE.

Q BY MR. NELSON: WITH RESPECT TO SOME PRIOR TESTIMONY THAT YOU GAVE REGARDING WHETHER SOME ASSUMPTIONS USED IN THIS PLAN WERE USED AS AN OFFSET TO OTHER LESS CONSERVATIVE ASSUMPTIONS, IS THERE ANY BASIS BY WHICH YOU CAN QUANTIFY THE EXTENT TO WHICH, SAY, A MORTALITY ASSUMPTION WOULD BE A LITTLE BIT MORE CONSERVATIVE THAN TO THE EXTENT TO WHICH AN INTEREST ASSUMPTION WOULD BE LESS CONSERVATIVE?

A WELL, OCCASIONALLY AND RATHER FREQUENTLY WHEN WE CHANGE AN INTEREST

ASSUMPTION, WE ALSO CHANGE [p. 163] THE MORTALITY TABLE ASSUMPTION, AND OTHER ASSUMPTIONS. AND WE LOOK AT THE RESULTS IN THE AGGREGATE. AND AS I SIT HERE AND RECALL HAVING DONE THAT IN SOME CASES IN THE PAST, MY GUESS WOULD BE THAT, FOR EXAMPLE, CHANGING FROM THE 1971 TABLE TO THE 1983 TABLE, WHICH WE DID JUST IN 1987, MIGHT HAVE SIMILAR EFFECT ON COST AS INCREASING THE INTEREST ASSUMPTION BY MAYBE THREE-TENTHS OR FOUR-TENTHS OF A PERCENT. DON'T HOLD ME TO THAT. BUT THAT'S THE SENSE OF MY ORDER OF MAGNITUDE OF THE DIFFERENCE BETWEEN THOSE TWO PARTICULAR MORTALITY TABLES.

WE ALSO CHANGED MORTALITY TABLE I THINK IN 19 – IN OUR JANUARY 1, 1983 VALUATION. AS YOU SEE THIS TABLE IS THE 1971 TABLE WITH AGES SET FORWARD ONE YEAR FOR PARTICIPANTS. WE REMOVED THE ONE-YEAR AGE SET-FORWARD AT THE SAME TIME THAT WE CHANGED THE INTEREST ASSUMPTION FROM SIX TO SIX-AND-A-HALF PERCENT.

Q WITH RESPECT TO THE INTEREST ASSUMPTIONS FOR CALCULATING WITHDRAWAL LIABILITY, THE TRUST USES TWO DIFFERENT RATES FOR TWO DIFFERENT PURPOSES IN COMPUTING THE WITHDRAWAL LIABILITY; IS THAT CORRECT?

A YES.

Q FOR ASSETS ON HAND, THE INTEREST ASSUMPTION WOULD BE THE APPROPRIATE P.B.G.C. RATES?

A YES, THE P.B.G.C. ASSUMPTION FOR TERMINATING [p. 164] SINGLE EMPLOYER PLANS FOR THE MONTH IN QUESTION. IN THIS CASE, THE MONTH IS DECEMBER. I BELIEVE COUNSEL BEERS MISSPOKE WHEN HE MENTIONED THAT IT WAS AN ANNUAL SURVEY. IT'S ACTUALLY A MONTHLY SURVEY. BUT FOR OUR PURPOSES, ONLY DECEMBER MATTERS.

Q TO THE EXTENT THAT THE VALUE OF THE ASSETS DOES NOT COVER THE PRESENT VALUE OF THE BENEFITS, THE TRUST FUND THEN USES A SIX-PERCENT ASSUMPTION FOR THAT SEPARATE PURPOSE?

A CORRECT.

Q THAT SIX-PERCENT ASSUMPTION IS DERIVED FROM THE FUNDING ASSUMPTION?

A IT IS THE FUNDING ASSUMPTION.

Q IT IS THE FUNDING ASSUMPTION.

WOULD NOT YOU EXPECT THAT THE FUTURE EXPERIENCE WITH RESPECT TO WITHDRAWAL LIABILITY WOULD BE FUNDAMENTALLY DIFFERENT FROM THE FUNDING ASSUMPTION?

A NOT FUNDAMENTALLY DIFFERENT. THE ONLY DIFFERENCE IS THAT THE VESTED LIABILITIES ARE PAID OUT OVER A SLIGHTLY SHORTER PERIOD OF TIME THAN THE NONVESTED LIABILITIES. THE NONVESTED LIABILITIES TEND TO BE FOR YOUNGER PEOPLE. THE NONVESTED LIABILITY'S USUALLY QUITE SMALL.

Q I MAY BE CONFUSED, MR. BATES. LET ME DIRECT YOUR ATTENTION TO EXHIBIT "C." IT WOULD BE THE [p. 165] THIRD PAGE OF THE EXHIBIT. CAN I DIRECT YOUR ATTENTION TO THE FIRST PARAGRAPH AND THE LAST SENTENCE IN THAT PARAGRAPH, WHICH READS, "HOWEVER, FUTURE EXPERIENCE FOR WITHDRAWAL LIABILITY PURPOSES IS DIFFERENT FROM FUTURE EXPERIENCE FOR FUNDING."

IS THAT PARTICULAR STATEMENT CORRECT?

A YES.

Q HOW ARE THEY DIFFERENT?

A WELL, THE REST OF THAT PAGE EXPLAINS. THERE ARE FIVE REASONS WHY THEY'RE DIFFERENT. THE FIRST ONE IS ONE I ALREADY ALLUDED TO. DO YOU WANT ME TO GO THROUGH THE OTHERS?

Q NOT UNLESS THERE'S SOMETHING IN ADDITION TO WHAT'S ON THE PAGE.

A I THINK NOT.

Q IS THE SIX-PERCENT ASSUMPTION USED IN LIEU OF THE P.B.G.C. RATES BECAUSE YOU DON'T HAVE THE WITHDRAWAL LIABILITY PAYMENT IN HAND?

A THAT'S ONE OF THE REASONS.

Q WHAT ARE THE OTHER REASONS?

A WELL, THERE ARE SEVERAL REASONS. ONE IS THE – IS THE FACT, AS INDICATED ON THIS PAGE,

THAT THE WITHDRAWAL LIABILITY PAYMENT SCHEDULE FOR THE EMPLOYER IS - INCLUDES INTEREST AT THE VALUATION INTEREST ASSUMPTION BY STATUTE.

SINCE THE VALUATION OF INTEREST ASSUMPTION [p. 166] IS SIX PERCENT, ONCE YOU'VE DECIDED THAT THE WITHDRAWAL LIABILITY FOR THE EMPLOYER IS "X" DOLLARS, HOWEVER YOU DETERMINE IT, INTEREST IS THEN CHARGED THROUGH THE PAYMENT PERIOD AT THE RATE OF SIX PERCENT. SO THAT'S ONE REASON FOR CONSISTENCY SAKE TO USE SIX PERCENT IN THE VALUATION OF LIABILITIES.

ANOTHER REASON IS THAT THE LANGUAGE IN THE STATUTE CALLING FOR, OR DESCRIBING THE ASSUMPTIONS THAT ARE TO BE USED FOR WITHDRAWAL LIABILITY, INCLUDES THE REQUIREMENT THAT THE ASSUMPTIONS IN THE AGGREGATE BE THE ACTUARY'S BEST ESTIMATE AND REASONABLE IN THE AGGREGATE, ET CETERA, ALL OF WHICH IS EXACTLY THE SAME LANGUAGE THAT'S IN ERISA DESCRIBING THE INTEREST ASSUMPTION THAT IS TO BE USED FOR FUNDING OF THE PLAN.

LET ME - PERHAPS YOU'D BETTER REPEAT THE QUESTION SO I DON'T JUST GO ON WANDERING OFF.

MR. NELSON: PERHAPS WE OUGHT TO HAVE IT READ BACK.

(RECORD READ AS FOLLOWS:

"QUESTION: WHAT ARE THE OTHER REASONS?")

THE WITNESS: SO WHAT ARE THE OTHER REASONS FOR THE ASSUMPTIONS TO BE DIFFERENT?

Q BY MR. NELSON: CORRECT.

A IN THAT CASE, I WAS GIVING REASONS FOR THEM TO BE THE SAME. I'M SORRY.

[p. 167] THE MAJOR OTHER REASONS FOR THEM TO BE DIFFERENT IS IN OUR TREATMENT OF EXPENSES FOR FUNDING PURPOSES, WE SAY, THE EXPECTED EXPENSES FOR NEXT YEAR ARE "X" DOLLARS. FOR WITHDRAWAL LIABILITY PURPOSES WE DON'T DO THAT. WE IMPLICITLY LOAD THE INTEREST ASSUMPTION FOR EXPENSES, AS DOES THE P.B.G.C., AND, OF COURSE, AS DO INSURANCE COMPANIES UPON WHOSE RATES THE P.B.G.C. ASSUMPTIONS ARE BASED.

Q LET ME DIRECT YOUR ATTENTION TO PAGE 3 OF EXHIBIT "C". BENEATH THE NUMBERED PARAGRAPHS, IN APPROXIMATELY THE MIDDLE OF THE NEXT PARAGRAPH, IS A STATEMENT WHICH SAYS, "CONSISTENT WITH THIS IS THE PROVISION UNDER ITEM 2 ABOVE THAT THE WITHDRAWING EMPLOYER WHO PAYS HIS LIABILITY IN A LUMP SUM (SO THAT ALL ASSETS ARE IN HAND) WILL HAVE THE TOTAL LIABILITY CALCULATED USING PLAN TERMINATION INTEREST ASSUMPTIONS."

DOES THAT SENTENCE REFER TO A PRACTICE OF THIS TRUST FUND OF COMPUTING WITHDRAWAL LIABILITY FOR EMPLOYERS WHO PAY IN LUMP SUM BY USING ALL P.B.G.C. RATES?

A I DON'T KNOW. THAT IS, I DON'T KNOW WHETHER THIS FUND HAS A PRACTICE OF DOING THAT.

Q REFERRING TO THE SAME PARAGRAPH IN WHICH THAT PRIOR STATEMENT WAS MADE ON EXHIBIT "C", THE OPENING SENTENCE STATES, AND I QUOTE:

> [p. 168] "THE APPROACH WE ARE PROPOSING ESSENTIALLY TREATS THE WITHDRAWAL OF SINGLE EMPLOYER PLAN TERMINATION FOR THAT PORTION OF THE ASSIGNED BENEFITS THAT COULD BE PURCHASED BY EXISTING ASSETS."

THEN IT GOES ON TO MAKE ANOTHER STATEMENT, AND THEN A REFERENCE TO THE PROVISION THAT THE WITHDRAWING EMPLOYER WHO PAYS HIS LIABILITY IN A LUMP SUM WILL HAVE THE TOTAL LIABILITY CALCULATED USING PLAN TERMINATION INTEREST ASSUMPTIONS. DO YOU KNOW IF THAT RECOMMENDATION WAS EVER ADOPTED BY THE PLAN?

A I DON'T KNOW THAT IT WAS. I SHOULD MENTION, OF COURSE, THAT WHEN WE SAY A LUMP SUM, WE MEAN, IN A LUMP SUM ON OR ABOUT WHEN THE FIRST PAYMENT WOULD BE DUE, NOT, YOU KNOW, SOMETIME LATER.

(BRIEF PAUSE.)

Q BY MR. NELSON: MR. BATES, I BELIEVE YOU SAID THAT YOU DON'T KNOW WHETHER THE TRUST FUND EVER ACTED ON THE RECOMMENDATION THAT YOU TREAT AN EMPLOYER PAYING ONE LUMP SUM WITHDRAWAL LIABILITY AS THOUGH ALL OF THE LIABILITY WERE COMPUTED AT P.B.G.C. RATES. ARE YOU AWARE OF ANY ACTION TAKEN BY THE TRUSTEES TO REJECT THAT RECOMMENDATION?

A I'M NOT. I SHOULD SAY, THAT I WAS NOT PRESENT WHEN THOSE DISCUSSIONS WERE HELD. IT WAS A NUMBER OF YEARS AGO, IF INDEED THERE WERE ANY [p. 169] DISCUSSIONS.

Q MR. BATES, LET ME ASK YOU THIS PARTICULAR QUESTION: DO YOU KNOW WHO MAKES THE CALCULATION REGARDING WITHDRAWAL LIABILITY FOR AN EMPLOYER, INDIVIDUAL EMPLOYER?

A THE FUND. THE FUND OFFICE.

Q WOULD YOU BE REFERRING TO THE PLAN ADMINISTRATOR?

A YES.

Q DO YOU KNOW WHAT GUIDELINES THE PLAN ADMINISTRATOR USES TO MAKE A WITHDRAWAL LIABILITY ASSESSMENT?

A THEY USE THE LIABILITY AMOUNTS AND WORKSHEETS, I BELIEVE, PREPARED BY US, IF THAT'S WHAT YOU MEAN BY GUIDELINES.

Q YOU WOULD THEN COMPUTE, YOU, BEING MARTIN SEGAL, WOULD COMPUTE THE VALUES FOR THE WITHDRAWAL LIABILITY POOLS FOR 1979 AND 1980?

A CORRECT.

Q I TAKE IT, THEN, WHEN YOU'RE COMPUTING THOSE WITHDRAWAL LIABILITY POOLS, YOU DO NOT MAKE THE DISTINCTION BETWEEN AN EMPLOYER WITHDRAWING AND PAYING A LUMP SUM, AND AN EMPLOYER MAKING PAYMENTS OVER TIME?

A THE POOLS DON'T MAKE THAT DISTINCTION, NO.

Q WITH RESPECT TO THE P.B.G.C. INTEREST RATE [p. 170] ASSUMPTIONS, THE P.B.G.C. RATE IS REALLY A RANGE OF RATES, IS IT NOT?

A YES.

Q THAT WOULD BE A RANGE OF RATES OVER TIME, WOULD IT NOT?

A YES.

Q ARE YOU AWARE OF ANY STUDIES COMPARING THE P.B.G.C. INTEREST RATES WITH RATES WHICH A PRIVATE INSURANCE CARRIER WOULD CHARGE TO ASSUME SIMILAR LIABILITIES?

A I'M NOT AWARE OF STUDIES. I'M AWARE OF STATEMENTS THAT – THAT I'VE HEARD ACTUARIES MAKE STATING THAT THEY THOUGHT P.B.G.C. RATES HAD BECOME CONSERVATIVE WITH RESPECT TO ANNUITY PURCHASE RATES.

Q WITH RESPECT TO THE CONSERVATIVE NATURE OF THE P.B.G.C. INTEREST RATES THAT YOU HEARD OTHER ACTUARIES SPEAK, WAS THERE ANY ORDER OF MAGNITUDE DISCUSSED AS TO HOW CONSERVATIVE THE P.B.G.C. RATES WOULD BE AS COMPARED TO A PRIVATE INSURANCE CARRIER?

A NOT MY – MY SENSE OF IT IS THAT THE DIFFERENCE IS NOT GREAT, BUT THAT THE – I DON'T RECALL ANYBODY SAYING THAT THEY WERE AS MUCH AS A HALF OF A PERCENT TOO LOW. MAYBE PEOPLE WERE IMPLYING THAT THEY COULD BE A QUARTER PERCENT TOO LOW, OR SOMETHING LIKE THAT. I DON'T KNOW.

Q YOU DON'T RECALL WHAT PERCENTAGE ORDER OF [p. 171] MAGNITUDE WAS BEING DISCUSSED?

A NO. NO. I MEAN, IF THEY CLAIMED THEY WERE ONE POINT TOO LOW, I THINK I WOULD HAVE REMEMBERED.

Q YOU HAVE AN INDEPENDENT OPINION ON THAT TOPIC?

A ONLY A METHODOLOGICAL ONE, AND THAT IS THAT THEY BASE THEIR RATES ON A SURVEY OF INSURANCE COMPANY PURCHASE RATES, AND THEN TAKE AN AVERAGE. IF YOU WERE TO TAKE THAT SURVEY BECAUSE YOU WANTED TO BUY SOME ANNUITIES, YOU PROBABLY WOULDN'T BUY THE AVERAGE RATE. YOU WOULD BUY THE BEST RATE YOU COULD FIND. SO IN THE SENSE THAT THE

AVERAGE DIFFERS FROM THE BEST RATE, METHODOLOGICALLY YOU WOULD EXCEPT A LITTLE CONSERVATISM TO COME IN THAT WAY.

Q WITH RESPECT TO THE APPLICATION OF THE SIX-PERCENT ASSUMPTION TO THE VESTED LIABILITIES, THAT REPRESENTS THE MORE CONSERVATIVE END TO THE BEST ESTIMATE RANGE, DOES IT NOT?

A IN AND OF ITSELF IT IS A LITTLE CONSERVATIVE. BUT WHEN YOU COMBINE IT WITH THE WAY IT'S USED, CONSIDERING THE IMPACT I MENTIONED ON MORTALITY AND THE FACT THAT IT'S NET OF EXPENSE LOADING, THEN I WOULD SAY IT'S NOT ON THE CONSERVATIVE END. AND PARTICULAR IF YOU'RE TALKING ABOUT WITHDRAWAL LIABILITY. MY UNDERSTANDING IS OTHER PLANS ARE USING THE VALUATION INTEREST [p. 172] ASSUMPTION FOR ALL OF THE LIABILITIES. SO IN THAT SENSE, OUR METHOD TAKEN TOGETHER IS NOT CONSERVATIVE AT ALL.

Q WITH RESPECT TO THE OTHER PLANS THAT USE A SIMILAR INTEREST RATE ASSUMPTION THAT YOU WERE REFERRING TO A MOMENT AGO, ARE THOSE ALL CLIENTS OF MARTIN SEGAL?

A NEARLY ALL CLIENTS OF MARTIN SEGAL USE THE SEGAL METHOD, THIS TWO-TIER METHOD. THE CLIENTS' PLANS THAT I MENTIONED WHO ARE USING THE VALUATION RATE TO ASSESS ALL WITHDRAWAL LIABILITY, VIRTUALLY NONE OF THOSE ARE CLIENTS OF THE SEGAL COMPANY NOW.

Q ARE YOU AWARE OF ANY OTHER ACTUARIAL FIRM THAT HAS A LARGER PERCENTAGE SHARE OF MULTI-EMPLOYER PENSION PLAN MARKET THAN MARTIN SEGAL?

A I'M SURE THERE ARE NONE.

Q DO YOU KNOW WHAT THE MARKET SHARE OF YOUR NEXT HIGHEST COMPETITOR WOULD BE?

A NO. THERE'S A SAYING THAT IN THIS PARTICULAR MARKET, THE MARTIN SEGAL COMPANY IS FIRST AND NO ONE IS SECOND. JUST IN THAT REGARD, I MIGHT MENTION THAT ONE COMPANY HAS BEEN ACTIVELY BUYING UP A LOT OF OTHER COMPANIES AND THEIR SHARE OF THE MARKET MAY HAVE GROWN TO SECOND PLACE. THAT'S THE MERCER, MEIDINGER, HANSEN AND MCGINN COMPANY.

Q THAT COMPANY'S SHARE OF THE MARKET WOULD BE [p. 173] SIGNIFICANTLY LESS THAN THE TEN TO TWENTY PERCENT WHICH MARTIN SEGAL HOLDS?

A YES.

MR. BEERS: I THOUGHT THE EARLIER TESTIMONY WAS 20 TO 30 PERCENT?

THE WITNESS: TWENTY-FIVE TO 30 PERCENT.

MR. BEERS: TWENTY-FIVE TO 30 PERCENT.

MR. NELSON: I'M SORRY.

Q DO YOU HAVE ANY KIND IF A SENSE AS TO WHAT THE MARKET SHARE OF THE MERCER COMPANY WOULD BE?

A. NO.

THE ARBITRATOR: PARDON ME.

(DISCUSSION HELD OFF THE RECORD.)

(SHORT RECESS.)

THE ARBITRATOR: GO RIGHT AHEAD.

Q BY MR. NELSON: WITH RESPECT TO THE INVESTMENT RETURN ASSUMPTION, WE'RE TALKING ABOUT AN INTEREST RATE. AGAIN FOR DEFINITIONAL PURPOSES, ARE WE TALKING ABOUT WHAT WE'RE PROJECTING THE ASSETS WILL EARN BASED UPON MARKET VALUE?

A FOR WITHDRAWAL LIABILITY SO THAT WE GET THE MARKET VALUE PART IN, YEAH, THE ASSETS, INCLUDING THE FUTURE ASSETS AND CONTRIBUTIONS THAT WILL BE COMING IN IN THE FUTURE.

Q SO FOR WITHDRAWAL LIABILITY PURPOSES, WHEN WE TALK ABOUT INVESTMENT RETURN ASSUMPTIONS, WE'RE [p. 174] TALKING WHAT WE'RE PROJECTING THE ASSETS WERE BASED UPON THEIR MARKET VALUE FOR WITHDRAWAL LIABILITY PURPOSES?

A YEAH. AS I MENTIONED THE REMARKS ABOUT EXPENSE LOADING AND THE CONSERVATISM DUE TO THE NONCONSERVATISM AND THE MORTALITY.

MR. BEERS: THE QUESTION IS -

MR. NELSON: THE GENERAL CONCEPT HERE THAT I'M TALKING ABOUT. MORE FOR DEFINITIONAL PURPOSES THAN ANYTHING ELSE.

MR. BEERS: I'M NOT SURE WHETHER THE COMMUNICATION GOT ACROSS IN THE QUESTION WHETHER YOU'RE TALKING ABOUT ALL OF THE WITHDRAWAL LIABILITY RATE, OR JUST THE SIX PERCENT PART OF THE WITHDRAWAL LIABILITY RATE. THE RATE FOR WITHDRAWAL LIABILITY INCLUDES TWO RATES, MELDED TOGETHER.

MR. NELSON: I'M JUST TALKING FOR RIGHT NOW ABOUT AN ASSUMPTION AS TO INVESTMENT RETURN REGARDING COMPUTING WITHDRAWAL LIABILITY.

THE WITNESS: THEN WE'RE TALKING ABOUT FIVE RATES, AND FOUR P.B.G.C. RATES, AND THE SIX PERCENT VALUATION RATE.

MR. BEERS: THAT WAS MY ONLY POINT THAT WHEN YOU'RE TALKING ABOUT WITHDRAWAL LIABILITY, ALL OF THOSE PLUG INTO IT.

MR. NELSON: RIGHT.

[p. 175] Q BUT CONCEPTUALLY WHAT YOU'RE DOING WHEN YOU APPLY AN INVESTMENT RETURN ASSUMPTION RATE OR A GROUP OF RATES, IS TRYING TO DETERMINE WHAT THE ASSETS WILL EARN BASED UPON THEIR MARKET VALUE.

A WELL, I - OUR METHOD CONCEPTUALLY IS CLOSER TO THE NOTION THAT YOU TAKE YOUR

ASSETS AT MARKET VALUE AND BUY ANNUITIES. SO YOU DON'T CARE WHAT THEY'RE GOING TO EARN, BECAUSE THE INSURANCE COMPANIES ARE GOING TO MAKE OR BREAK BECAUSE THEY'LL HAVE THE MONEY ON THE NEW MONEY THAT COMES IN, IT'S - THAT'S THE NET - THE NET RETURN THAT WOULD BE EARNED ON THAT NEW MONEY.

Q THAT NET RETURN WOULD RESPOND GENERALLY TO WHAT WAS TAKING PLACE IN THE MARKETPLACE -

A YES.

Q - FOR THOSE ASSETS?

A YES. THE FUTURE MARKETPLACE.

Q RIGHT.

WOULD YOU EXPECT THE RATE OF RETURN ON THOSE ASSETS IN THE FUTURE MARKETPLACE TO BE HIGHER DEPENDING UPON HOW MUCH RISK YOU WERE WILLING TO ASSUME AND THE ASSETS YOU'RE PURCHASING?

A IN GENERAL, RISKY RETURNS PAY HIGHER RATES OF RETURN OVER LONG ENOUGH PERIODS. STUDIES HAVE SHOWN THAT.

Q I UNDERSTAND YOUR OPINION THAT THE TWO [p. 176] GROUPS OF RATES USED IN WITHDRAWAL LIABILITY CALCULATION, THE P.B.G.C. RATES AND THE SIX PERCENT FUNDING RATE ARE REASONABLE. IS IT YOUR OPINION THAT THEY ARE THE HIGHEST REASONABLE RATE?

A NO.

Q THERE WOULD BE OTHER RATES THAT COULD BE APPLIED THAT WOULD BE HIGHER THAN BOTH THE P.B.G.C. RATE AND THE SIX PERCENT FUNDING RATE WHICH COULD, NEVERTHELESS, BE REASONABLE IN PURPOSES OF COMPUTING THE WITHDRAWAL LIABILITY?

A IF YOU MEAN HIGHER THAN THE P.B.G.C. RATE AND APPLIED TO THE ENTIRE LIABILITY, I HAVE A PROBLEM WITH THAT. I THINK THAT WOULD NOT BE REASONABLE ABSENT AN OFFER TO PAY THE LIABILITY IN A LUMP SUM, BECAUSE YOU JUST CAN'T INVEST IN RATES WITH MONEY THAT YOU DON'T HAVE.

Q ARE THE P.B.G.C. AND FUNDING RATES ALSO APPLIED TO COMPUTE THE VALUE OF THE ASSETS ON HAND TO PAY BENEFITS?

A THE VALUE OF ASSETS ON HAND IS COMPUTED BY THE - THE ACCOUNTANTS AND THE AUDITORS OF THE FUND.

Q YOU DON'T PARTICIPATE IN THAT PROCESS?

A NO.

Q OKAY.

A ONLY RARELY, AND NOT IN THIS CASE. SOMETIMES THERE ARE INSURANCE CONTRACTS THAT THE [p. 177] AUDITORS MAY NOT UNDERSTAND VERY WELL, SPECIAL SITUATIONS THAT, TO MY KNOWLEDGE, DOES NOT APPLY TO THIS CASE.

Q SUBSEQUENT TO THE CONCRETE PIPE & PRODUCTS WITHDRAWAL, THERE WERE REALLOCATION POOLS CREATED, WERE THERE NOT?

A YES.

Q WHAT DID THOSE REALLOCATION POOLS CONSIST OF?

A REALLOCATED POOLS UNDER THE STATUTE ARE SET UP TO REPRESENT OR REALLOCATE WITHDRAWAL LIABILITIES THAT ARE NOT GOING TO BE COLLECTED. THE MAIN TWO SOURCES OF REALLOCATED POOLS ARE THE DE MINIMIS DEDUCTIBLE, AS APPLIED TO PARTICULAR EMPLOYERS, AND AMOUNTS WRITTEN OFF AS NOT COLLECTIBLE ON ACCOUNT OF BANKRUPTCY OR SOME -SOME - SOMETHING LIKE THAT, OR A SETTLEMENT THAT WAS OBTAINED AT UNFAVORABLE TERMS.

MR. BEERS: I JUST WANT TO POINT OUT THAT AS FAR AS ANY ISSUE INVOLVING CONCRETE PIPE, THE REALLOCATION POOLS ARE IRRELEVANT SINCE THEY CAME INTO EFFECT THE YEAR AFTER THE RELEVANT YEARS FOR CALCULATING CONCRETE PIPE'S WITHDRAWAL LIABILITY. BUT I HAVE NO PROBLEMS WITH THE QUESTIONS OR ANSWERS TO EDUCATE THE ARBITRATOR ON BACKGROUND INFORMATION.

MR. NELSON: AND THE NEXT ONE MAY BE THE ONE THAT TIES IT ALL UP.

[p. 178] Q WE REFERRED TO THESE REALLOCATION POOLS AS REALLOCATION POOLS BECAUSE THE SUMS THAT GO INTO THOSE POOLS ARE TAKEN

FROM THE GENERAL WITHDRAWAL LIABILITY POOLS FOR PRECEDING YEARS?

A THEY'RE NOT SUBTRACTED FROM THOSE POOLS. THEY'RE JUST AMOUNTS THAT WOULD HAVE BEEN ASSESSED TO A WITHDRAWING EMPLOYER OR WITHDRAWING EMPLOYERS, BUT WERE NOT ASSESSED BECAUSE OF PARTICULAR REASONS, USUALLY THE DE MINIMIS OR BANKRUPTCY.

Q SO THE AMOUNT THAT GOES INTO THE WITHDRAWAL LIABILITY POOL FOR THE DE MINIMUS DEDUCTION IN 1982 IS STILL PRESENT IN THE WITHDRAWAL LIABILITY POOL FOR 1979 AND 1980?

A YES. THE QUESTION SEEMS TO IMPLY THAT IT'S A DOUBLE COUNTING. IT ISN'T. IT IS AN ACCOUNTING AGAIN OF SOMETHING THAT WAS COUNTED ONCE AND THEN WAS LOST.

Q WITH RESPECT TO THE ORIGINAL POOLS, THE 1979, 1980 POOLS, THOSE POOLS INCLUDE LIABILITY FOR EMPLOYERS WHO WITHDRAW PRIOR TO THE EFFECTIVE DATE OF THE ACT, CORRECT?

A IT INCLUDES ALL OF THE LIABILITIES OF THE PARTICIPANTS OF THE FUND, MINUS THE ASSETS OF THE FUND, SO THE EXPERIENCE OF ALL OF THE EMPLOYERS AFFECTS THAT.

Q FOR PURPOSES OF DETERMINING THE EXTENT TO [p. 179] WHICH UNFUNDED VESTED LIABILITIES EXCEED ASSETS TO PAY BENEFITS, DO YOU INCLUDE WITHDRAWAL LIABILITY PAYMENTS?

A ONLY THE WITHDRAWAL LIABILITY PAYMENTS THAT HAVE BEEN RECEIVED OR ACCRUED AS CALCULATED BY THE AUDITOR, AND BY ACCRUED IN THAT SENSE, I MEAN, DUE, LET'S SAY, FOR THE MONTH OF DECEMBER AND PAID IN JANUARY.

Q SO THE WITHDRAWAL LIABILITY PAYMENTS RECEIVED BY THE TRUST FUND ARE ADDED BACK INTO THE ASSET BASE FOR PURPOSES OF DETERMINING WHAT THE AGGREGATE UNFUNDED LIABILITY WOULD BE?

A THEY'RE IN THE ASSET BASE. THEY'VE PROBABLY BEEN INVESTED IN SOMETHING.

Q THE ASSET BASE WOULD ALSO INCLUDE AMOUNTS BY WHICH THE PLAN'S INVESTMENT PERFORMANCE EXCEEDED THE ACTUARIAL ASSUMPTION FOR THAT PERFORMANCE?

A YES.

(BRIEF PAUSE.)

MR. NELSON: I HAVE NOTHING FURTHER FOR THIS WITNESS.

THE ARBITRATOR: I JUST LOOKED AT THE CLOCK. YOU'RE GOING TO TAKE HIM NEXT?

MR. BEERS: I'M GOING TO ONLY ASK HIM A COUPLE OF QUESTIONS RELATING TO THE TESTIMONY THAT CAME ON DIRECT.

[p. 180] THE ARBITRATOR: IF IT'S GOING TO BE EXTENDED –

MR. BEERS: VERY SHORT.

CROSS-EXAMINATION

BY MR. BEERS:

Q MR. BATES, TAKE A LOOK AT PAGE 2 OF EXHIBIT 7-C. I JUST WANT TO CLARIFY SOMETHING THAT MIGHT ALREADY BE CLEAR IN EVERYBODY'S MIND, AND IT MIGHT NOT.

MR. NELSON: PAGE 2 OF THE EXHIBIT?

MR. BEERS: PAGE 2 OF THE EXHIBIT 7-C. THE PAGE NUMBER 2, ITS ACTUALLY PAGE 3.

MR. NELSON: ALL RIGHT.

Q BY MR. BEERS: UP AT THE TOP IT'S ENTITLED, ASSUMPTIONS, UNDERLINE WITHDRAWAL LIABILITY. AND THEN ON DIRECT YOU WERE TESTIFYING ABOUT THE VARIOUS ITEMS LISTED THERE, I BELIEVE THERE ARE FIVE OF THEM, AS TO HOW THE FUNDING ASSUMPTIONS DIFFER FROM THE WITHDRAWAL LIABILITY ASSUMPTIONS.

A YES.

Q DO YOU SEE THAT THERE?

A YES.

Q WHEN YOU'RE TALKING ABOUT THE FUNDING ASSUMPTION, YOU'RE TALKING ABOUT ONLY THE SIX PERCENT RATE; IS THAT RIGHT?

A WELL, THE RATE WHICH HAPPENED TO BE SIX [p. 181] PERCENT THIS YEAR FOR THIS FUND.

Q IN OTHER WORDS, THE NET INVESTMENT, CORRECT?

A THE NET INVESTMENT ASSUMPTION.

Q IN OTHER WORDS WHEN YOU'RE TALKING ABOUT THE RATE BEING CONSERVATIVE, FOR EXAMPLE, IN THE THIRD HIGHLIGHTED PARAGRAPH, YOU'RE TALKING JUST ABOUT THAT NET INVESTMENT RATE BEING CONSERVATIVE TO USE FOR WITHDRAWAL LIABILITY PURPOSES?

A YES. WE DRAW THE DISTINCTION BETWEEN WITHDRAWAL LIABILITY PURPOSES AND FUNDING ASSUMPTIONS, FUNDING PURPOSES. WE SAY FOR FUNDING PURPOSES WE'RE MORE CONSERVATIVE, BUT FOR WITHDRAWAL LIABILITY A HIGHER ASSUMPTION IS JUSTIFIED.

Q IN FACT, THOSE FIVE FACTORS ADD UP TO THE REASONS WHY SEGAL HAS A TWO-TIER METHOD; IS THAT RIGHT?

A THAT'S CORRECT.

Q IN FACT, I POINT OUT ON THE BOTTOM OF PAGE 2, THAT THAT SEEMS TO BE WHAT THE REPORT ACTUALLY SAYS, THAT THE INTEREST ASSUMPTIONS ARE DIFFERENT ENOUGH FOR FUNDING THAT YOU HAVE TO HAVE THIS MELDED RATE. AND THEN ON THE NEXT PAGE, IT TALKS ABOUT THE TWO-TIER METHOD. IS THAT YOUR UNDERSTANDING AS TO THE MEANING OF THE DOCUMENT?

A YES.

[p. 182] MR. BEERS: NO FURTHER QUESTIONS.

THE ARBITRATOR: DO YOU WANT TO ASK ANYTHING ABOUT THAT?

MR. NELSON: NO.

THE ARBITRATOR: PERHAPS THIS IS A GOOD TIME TO BREAK. HOW MUCH TIME DO YOU NEED FOR LUNCH?

MR. BEERS: IF WE CAN MAKE IT AS SHORT AS CONVENIENT FOR EVERYONE.

(DISCUSSION HELD OFF THE RECORD.)

THE ARBITRATOR: WE'RE ADJOURNED UNTIL 1:20.

(LUNCH RECESS TAKEN AT 12:20 P.M.)

[p. 183] LOS ANGELES, CALIFORNIA; THURSDAY, FEBRUARY 18, 1988

1:20 P.M.

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THE ARBITRATOR: ON THE RECORD. MR. NELSON, WE'LL RESUME. YOU'RE GOING TO BE CALLING A WITNESS, RIGHT?

MR. NELSON: THAT'S RIGHT.

THE ARBITRATOR: YOU MAY GO AHEAD.

MR. NELSON: I GUESS THIS IS MY CASE IN CHIEF, OR SOMETHING LIKE THAT.

THE ARBITRATOR: YES.

MR. NELSON: OUR NEXT WITNESS WILL BE JON KING.

JON L. KING,

CALLED AS A WITNESS BY THE COMPANY, HAVING BEEN PREVIOUSLY DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR NELSON:

Q FIRST OF ALL, JON, COULD YOU SPELL YOUR NAME FOR THE COURT REPORTER?

A JON, J-O-N, "L" MIDDLE INITIAL, KING, K-I-N-G.

Q WHAT IS YOUR BUSINESS ADDRESS?

[p. 184] A 1801 CENTURY PARK EAST, LOS ANGELES, CALIFORNIA 90067. THAT WAS SUITE 480, IF I DIDN'T GIVE IT TO YOU.

Q WHO IS YOUR PRESENT EMPLOYER?

A BUCK CONSULTANTS.

Q WHAT POSITION DO YOU HOLD WITH BUCK CONSULTANTS?

A I'M A CONSULTING ACTUARY AND MANAGER OF THEIR LOS ANGELES OFFICE.

Q WE'VE PREVIOUSLY MARKED AS EXHIBIT -

THE ARBITRATOR: 13.

Q BY MR. NELSON: - 13, A RESUME. WOULD YOU TAKE A LOOK AT THAT AND TELL ME IF THAT'S YOUR RESUME?

A YES, IT IS.

Q PRIOR TO GOING TO WORK FOR BUCK CONSULTANTS, DID YOU WORK FOR, I BELIEVE IT'S OCCIDENTAL INSURANCE COMPANY?

A AT THAT TIME IT WAS OCCIDENTAL LIFE - MY FIRST JOB, MY FIRST FULL-TIME JOB AFTER GRADUATION FROM COLLEGE WAS WITH OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, NOW KNOWN AS TRANSAMERICA LIFE INSURANCE COMPANY.

Q WHAT DID DO YOU FOR OCCIDENTAL LIFE?

A WHEN I FIRST STARTED, I WAS SUPERVISOR OF THE PENSION MATH SECTION. AND AMONG OTHER THINGS, WE [p. 185] WOULD DO SINGLE PREMIUM QUOTATIONS FOR LARGE PENSION PLANS THAT WERE TERMINATING.

I, AT ANOTHER TIME LATER IN MY CAREER WITH OCCIDENTAL, WAS MANAGER OF DIRECT LIFE PRODUCT, AND MY DEPARTMENT WAS RESPONSIBLE FOR DETERMINING THE DESIGN AND PRICING OF THEIR ORDINARY OR RATE BOOK PRODUCTS, THEIR MAINLINE PRODUCTS.

Q WOULD THAT INCLUDE THE PRODUCTS YOU DESCRIBED JUST A MOMENT AGO OF BEING THE ONES -

A NO. THOSE WOULD HAVE BEEN TRULY LIFE INSURANCE PRODUCTS. WHEN I WAS IN THE PENSION SUPERVISION SECTION, IT WAS MORE A - I WAS JUST OUT OF COLLEGE AT THAT TIME AND IT

WAS MORE A, RATHER THAN A DECISION-MAKING RESPONSIBILITY, IT WAS A IMPLEMENTATION ROLE.

Q ARE YOU AN ACTUARY?

A YES.

Q DURING THE COURSE OF YOUR PROFESSIONAL CAREER, HAVE YOU SEEN STUDIES COMPARING P.B.G.C. INTEREST RATES WITH THOSE AVAILABLE FOR SIMILAR COVERAGE IN THE PRIVATE SECTOR?

A YES. WITH A FORMER EMPLOYER WHILE I WAS IN PENSION CONSULTING BUSINESS, WE STUDIED THE – WE STUDIED THAT VERY ISSUE AND WE FOUND THAT IF YOU COMPARED THE P.B.G.C. RATE BASIS TO THE MOST COMPETITIVE, THE MOST COMPETITIVE, SAY FIVE OR SIX [p. 186] COMPANIES AT ANY POINT IN TIME, THAT A GOOD RULE OF THUMB WAS THAT THE COMPETITIVE INTEREST RATES WOULD BE ONE PERCENT HIGHER THAN THE P.B.G.C. RATES, A HUNDRED BASIS POINTS.

Q I SUPPOSE WE OUGHT TO DEFINE WHAT A BASIS POINT IS?

A A BASIS POINT IS ONE-ONEHUNDREDTH OF ONE PERCENT. THERE IS OFTENTIMES CONFUSION BETWEEN WHEN YOU'RE TALKING ABOUT A FULL PERCENTAGE OR A BASIS. I JUST WANT TO MAKE THAT PERFECTLY CLEAR.

Q PRIOR TO YOUR TESTIMONY HERE TODAY, HAVE YOU EXAMINED THE DOCUMENTS WHICH ARE JOINT EXHIBIT 7, WHICH I PROBABLY OUGHT TO HAND TO YOU?

THE ARBITRATOR: DO YOU HAVE ANOTHER ONE?

MR. NELSON: I ONLY HAVE ONE.

MR. BEERS: HE CAN USE MINE. I HAVE ANOTHER SET THAT'S IN MY BINDER HERE.

THE WITNESS: YES, I HAVE IT.

Q BY MR. NELSON: HOW DID YOU COME TO EXAMINE THOSE DOCUMENTS?

A WELL, YOU HAD ASKED ME TO DRAW AN OPINION AS TO WHETHER THE INTEREST RATES – EXCUSE ME, THE ASSUMPTIONS IN THE AGGREGATE USED TO CALCULATE THE WITHDRAWAL LIABILITY IN THIS CASE WERE REASONABLE. AND I ASKED FOR THESE DOCUMENTS AS AN AID IN MAKING THAT DECISION.

[p. 187] Q DID YOU REACH A CONCLUSION AS TO WHETHER THE ACTUARIAL ASSUMPTIONS USED IN COMPUTING THE WITHDRAWAL LIABILITY WERE REASONABLE IN THE AGGREGATE?

A YES, I DID REACH A CONCLUSION, AND THAT CONCLUSION WAS THAT THE ASSUMPTIONS WERE NOT REASONABLE IN THE AGGREGATE. AND PERHAPS I SHOULD SAY THE WAY I REALLY GOT TO THAT WAS BY REVIEWING THE ASSUMPTIONS ON AN ASSUMPTION BY ASSUMPTION BASIS. AND ONLY TWO OF THE ASSUMPTIONS – EXCUSE ME, TWO OF THE ASSUMPTIONS REALLY HIT ME BETWEEN THE EYES AS WHERE THEY WERE EITHER OUT OF LINE OR PERHAPS OUT OF LINE.

THE FIRST ASSUMPTION, AND THE PRIMARY ASSUMPTION, BECAUSE IT WAS VERY, VERY IMPORTANT IN THE CALCULATION, WAS THE NET INVESTMENT INCOME OR NET ASSUMPTION, I THOUGHT THAT WAS VERY LOW. AND THE OTHER ASSUMPTION THAT BOTHERED ME WAS THE ASSUMPTION OF UNRECORDED PAST SERVICE CREDIT. BASED ON MR. BATES' TESTIMONY, I'M STILL NOT SURE THAT IT WAS A REASONABLE ASSUMPTION OR NOT, BUT PERHAPS, YOU KNOW, IT'S MINIMAL AND MAYBE WE COULD GIVE HIM THE BENEFIT OF THE DOUBT. BUT AGAIN, THAT ONE BOTHERED AND PARTICULARLY THE INTEREST RATE ASSUMPTION.

Q WHAT WAS YOUR BASIS FOR CONCLUDING THAT THE INTEREST RATE ASSUMPTION WAS TOO LOW?

[p. 188] A WELL, WHEN I'M LOOKING AT INTEREST RATE ASSUMPTIONS, I PREFER TO LOOK AT ECONOMIC REALITIES OF THE MARKETPLACE RATHER THAN LOOKING AT WHAT ASSUMPTIONS ARE BEING USED FOR THIS AND THAT PURPOSE BY OTHER ACTUARIES. AND ESSENTIALLY THE MARKETPLACE AT THAT TIME HAD INTEREST RATES MUCH HIGHER THAN THAT. AND MY MAIN EVIDENCE THAT I USED IN REACHING THAT CONCLUSION WAS A DOCUMENT THAT MY COMPANY COMPILES EVERY MONTH, AND THEY'VE DONE IT SINCE THE SEVENTIES SOMEWHERE, AND IT'S CALLED THE "BUCK FORWARD INTEREST RATES."

THE "BUCK FORWARD INTEREST RATES" ARE A SET OF INTEREST RATES THAT ARE DERIVED

FROM THE ACTUAL MARKETPLACE FOR RISK-FREE U.S. GOVERNMENT SECURITIES. NOW, ESSENTIALLY, THOSE SECURITIES ARE TREASURY BILLS, NOTES AND BONDS, UNITED STATES GOVERNMENT. ESSENTIALLY THE PROCESS WHERE WE DEVELOP THESE FORWARD INTEREST RATES IS ONCE A MONTH, AT THE BEGINNING OF THE MONTH, WE COMPILE 80 U.S. GOVERNMENT SECURITIES DESIGNED TO COVER THE SPECTRUM OF THE MATURITIES OF THOSE INSTRUMENTS, WHICH GOES OUT TO 30 YEARS. AND THROUGH FINANCIAL AND MATHEMATICAL TECHNIQUES, DETERMINE WHAT THE IMPLICIT MARKET FORECAST IS THAT IS DERIVED FROM THE BIDDING PROCESS FOR THOSE FINANCIAL INSTRUMENTS.

Q CAN YOU GIVE US AN EXAMPLE?

[p. 189] A CERTAINLY, AND THIS IS AN EXAMPLE DESIGNED TO EDUCATE, RATHER THAN AS TO THE METHODOLOGY AS OPPOSED TO TRYING TO BE REALISTIC IN TERMS OF ACTUAL NUMBERS. BUT IF THE YIELD FOR A ONE-YEAR TREASURY SECURITY OF SOME SORT WAS, SAY, TEN PERCENT, AND THE YIELD TO MATURITY FOR A TWO-YEAR SECURITY, U.S. TREASURY SECURITY WAS, SAY, NINE PERCENT PER YEAR, AND IGNORING COMPOUNDING, THAT WOULD EQUAL 18 PERCENT FOR TWO YEARS, ONE COULD CONCLUDE THAT THERE WAS AN EIGHT PERCENT FORECASTED RETURN BY THE MARKETPLACE BY THE PEOPLE WHO BID FOR THOSE SECURITIES, THAT THERE WOULD BE THAT FORECAST FOR THE YEAR, TOO, IN OTHER WORDS, 18 LESS TEN WAS AN EIGHT PERCENT FORECAST.

Q YOU MENTION THAT THESE INTEREST RATES ARE COMPILED AND ENTERTAINED BY YOUR CURRENT EMPLOYER. ARE THEY IN SOME SORT OF TABULATED FORM?

A YES. WE PUBLISH MEMOS, AND I PULLED ONE OUT OF THE FILE AND HAVE IT THERE.

MR. NELSON: I GUESS I'LL MARK THIS NEXT IN ORDER. I THINK IT WOULD BE 15.

THE ARBITRATOR: YES, IT IS. WE'LL MARK BUCK FORWARD INDEX TABLE ONE, COMPOSED OF A NUMBER OF PAGES, AS COMPANY EXHIBIT 15 FOR IDENTIFICATION.

(WHEREUPON, THE AFOREMENTIONED DOCUMENT WAS MARKED AS COMPANY EXHIBIT 15 FOR IDENTIFICATION.)

[p. 190] Q BY MR. NELSON: IS THE DOCUMENT WE'VE MARKED AS COMPANY EXHIBIT 15, IS THE DOCUMENT YOU'RE REFERRING TO AS BEING A TABULATION OF THE BUCK FORWARD INTEREST RATES?

A YES, IT IS. IT JUST SHOWS SAMPLE VALUES FOR DIFFERENT YEARS. IT DOESN'T SHOW ALL YEARS.

Q WHEN YOU SAY IT DOESN'T SHOW VALUES FOR ALL YEARS, I NOTICE IN THE RIGHT-HAND COLUMN THERE ARE ENTRIES FOR 1, 5, 10, 15 AND 20. WHAT YOU MEAN BY THE FACT THAT IT DOESN'T SHOW ALL YEARS, THAT YEARS 2 THROUGH 4 AND 6 THROUGH 9 ARE NOT INCLUDED?

A ARE NOT SHOWN.

Q THEY ARE, HOWEVER, INCLUDED IN THE RATES?

A YES, THEY ARE IN A SET OF RATES THAT'S CALCULATED.

Q I THINK YOU'VE ALREADY TESTIFIED THAT YOU CONCLUDED THAT THE TRUST FUNDS AND INTEREST RATE ASSUMPTION WAS TOO LOW. DID YOU PERFORM ANY KIND OF AN ANALYSIS TO DETERMINE WHAT MEASURES WOULD BE NECESSARY TO MODIFY THE TRUST FUND'S INTEREST RATES ASSUMPTIONS TO MAKE THEM REASONABLE IN THE AGGREGATE?

A YES. WHAT I CHOSE TO DO WAS TAKE THE BUCK FORWARD INTEREST RATES AND ESSENTIALLY APPLY THEM AGAINST THE TOTAL LIABILITIES AND TOTAL PRESENT VALUE OF VESTED BENEFITS OF THE ENTIRE PLAN. AND AS IN THE REASON I CHOSE THOSE IS BECAUSE THEY ARE RISK-FREE, [p. 191] AND I AGREE WITH MR. BATES THAT BASIC ECONOMIC THEORY SAYS IF YOU WERE TO TAKE RISKIER ASSETS, THAT YOU WOULD ONLY ENHANCE YOUR RETURN OVER THE LONG RUN. BY THE WAY, THE LONG RUN WOULD BE MUCH SHORTER OVER THE TIME PERIOD THAT WE'RE DOING THESE CALCULATIONS, THE – WOULD ONLY USE HIGHER INTEREST RATES AND HAS LOWER WITHDRAWAL LIABILITY.

SO WHAT I COULD – TO TYPIFY WHAT I'VE DONE, I HAVE TAKEN THE MINIMUM INTEREST

RATES, WHICH WOULD REALLY PRODUCE THE MAXIMUM EMPLOYER WITHDRAWAL LIABILITIES THAT I WOULD FEEL ARE REASONABLE.

Q I'VE NOTICED THAT THE TABLE, WHICH IS NOW EXHIBIT 15, CONTAINS SOME DATES IN THE EXTREME LEFT-HAND COLUMN. CAN YOU TELL US WHAT THOSE DATES SIGNIFY?

A THOSE ARE THE DATES AS OF WHICH THE SURVEY OF THE SECURITIES WERE TAKEN.

Q SO I UNDERSTAND WHAT'S GOING ON, A DATE OF 12-1-81, AND THE INTEREST RATES THAT OCCUR TO THE RIGHT OF THAT DATE, WOULD BE THE INTEREST RATES THAT WERE AVAILABLE DURING THAT MONTH?

A EXCUSE ME, ON THAT DATE.

Q ON THAT DATE. OKAY.

A IT MAY BE THAT IT'S THE NEAREST BUSINESS DATE TO THAT DATE, OR SOMETHING LIKE THAT, BUT ESSENTIALLY ON THAT DATE.

[p. 192] Q WE STARTED TO GET INTO WHY YOU FELT IT WAS APPROPRIATE TO USE THE U.S. GOVERNMENT FORWARD INTEREST RATES. I'M NOT QUITE SURE WE GOT THERE. WHY DID YOU CHOSE TO USE A FORECAST BASED UPON THOSE INTEREST RATES?

A WELL, BECAUSE THE MARKETPLACE SAYS THAT THESE INTEREST RATES ARE AVAILABLE. THAT'S ESSENTIALLY WHAT THIS IS ALL ABOUT.

ANOTHER WAY OF LOOKING AT THIS IS, THE – IF THE ACTUARY FOR THE TRUST FUND HAD MADE AVAILABLE TO, SAY, AN INVESTMENT MANAGER OR INVESTMENT PROFESSIONAL, THE CASH FLOWS THAT WOULD TAKE PLACE IN THE FUTURE, THE INVESTMENT PROFESSIONAL COULD HAVE GONE OUT AND BOUGHT RISK-FREE SECURITIES, SUCH THAT THE CASH FLOW OF THOSE SECURITIES WOULD MATCH THE CASH FLOWS OF THE PENSION PLAN. AND IF YOU DID THAT, YOU'D COME UP WITH THE SAME TYPE OF – THE SAME RESULT AS I HAVE DONE BY USING THE BUCK FORWARD INTEREST RATES. AND IN EITHER CASE, AND IT'S REALLY THE SAME THING, YOU WOULD HAVE MUCH LOWER EMPLOYER WITHDRAWAL LIABILITY, PRESENT VALUE OF VESTED BENEFITS, THAN WOULD BE OBTAINED THROUGH THE ACTUAL CALCULATION METHOD EMPLOYED BY SEGAL. DID I COVER THE –

Q I THINK SO.

THE QUESTION I GUESS IS: WHY USE U.S. [p. 193] GOVERNMENT SECURITIES AS OPPOSED TO SOMETHING ELSE?

A THEY'RE – THEY'RE RISK-FREE. AND IF I HAD USED A – I COULD HAVE USED INTEREST RATES SAY IMPLICIT IN CORPORATE BONDS, TRIPLE "A" BONDS, AND THEY WERE AT HIGHER YIELDS THAN THE U.S. GOVERNMENT BONDS AND SECURITIES, AND THAT WOULD HAVE GIVEN US A LOWER EMPLOYER WITHDRAWAL LIABILITY. BUT THAT WOULD HAVE BEEN ARGUABLE AS TO HOW MUCH

RISK IS REASONABLE, AND RATHER THAN CHOOSING THAT ARGUMENT, I TRIED TO TAKE AN UNIMPEACHABLE STAND, A TOTALLY DEFENSIBLE STAND, UNASSAILABLE IS THE WORD THAT I'M LOOKING FOR.

Q WITH RESPECT TO TESTIMONY YOU'VE HEARD BEFORE ABOUT THE P.B.G.C. RATES, DID YOU CONSIDER USING THOSE AS A BASIS FOR COMING UP WITH THE INTEREST RATES?

A I DID CONSIDER THEM, BUT I DIDN'T THINK THEY WERE APPROPRIATE. AS I POINTED OUT, THERE ARE CONSERVATIVE STUDIES WHICH HAVE SHOWN THAT THEY ARE CONSERVATIVE, AND MOREOVER, I MEAN, THEY DO THE SURVEY THAT MR. BATES INDICATED. BUT IN MY EXPERIENCE AT OCCIDENTAL, I WAS - I REMEMBER ONE TIME MY BOSS CAME UP TO ME AND TOLD ME TO QUOTE ON THIS ONE LARGE PENSION TERMINATION, AND HE TOLD ME WHAT INTEREST RATE ASSUMPTION TO USE. AND I SAID, "WELL, YOU KNOW, WE'RE NOT GOING TO BE COMPETITIVE [p. 194] WITH THAT. IT'S A WASTE OF MY TIME TO DO THE CALCULATION."

HE SAID, "I KNOW THAT, JON. I DON'T WANT TO WASTE YOUR TIME, BUT WE JUST WANT TO GIVE THE AGENTS A QUOTE TO KEEP THEM HAPPY. THE LAST THING I WANT IS HIS BUSINESS."

THIS IS TRANSAMERICA OCCIDENTAL. AT THAT TIME, I THINK IT WAS THE TENTH LARGER INSURER IN THE COUNTRY. I'D BE VERY SURPRISED IF THEY WEREN'T IN THE P.B.G.C. RATES. THIS IS THE BOTTOM LINE THAT THIS IS THE KIND OF SURVEY

INFORMATION THAT THE P.B.G.C. OBTAINS. SO I REALLY DON'T PUT MUCH STOCK IN IT.

Q DID YOU HAVE OCCASION TO COMPUTE OR RECOMPUTE THE WITHDRAWAL LIABILITY USING THE BUCK FORWARD INTEREST RATES?

A YES, I DID.

Q HAVE YOU PREPARED ANY EXHIBITS THAT WOULD SHOW THOSE RESULTS?

A YES, AND I HAVE THEM HERE.

Q WHY DON'T WE START MARKING AND IDENTIFYING THESE. I THINK THEY COME IN PACKAGES.

THE ARBITRATOR: WHY DON'T WE MARK IT FOR IDENTIFICATION AS COMPANY EXHIBIT 16 FOR IDENTIFICATION.

MR. NELSON: IT PROBABLY OUGHT TO BE 16-A [p. 195] THROUGH -D.

THE ARBITRATOR: ALL RIGHT. 16-A, -B, -C. -D. -A THROUGH -D.

(WHEREUPON, THE AFOREMENTIONED DOCUMENT WAS MARKED AS COMPANY EXHIBIT 16-A THROUGH 16-D FOR IDENTIFICATION.)

Q BY MR. NELSON: 16-A WOULD BE A DOCUMENT THAT AT THE TOP OF IT SAYS INTEREST BASIS BUCK FORWARD INTEREST RATES CONTRIBUTION BASIS INCLUDES CEN-VI-RO CONTRIBUTIONS?

A YES.

Q AND 16-B WOULD BE INTEREST BASIS, BUCK FORWARD INTEREST RATES, CONTRIBUTION BASIS EXCLUDES CEN-VI-RO CONTRIBUTIONS.

16- C. WOULD BE INTEREST BASIS P.B.G.C. RATES CONTRIBUTION BASIS INCLUDES CEN-VI-RO CONTRIBUTIONS.

16-D WOULD BE P.B.G.C. RATES AS AN INTEREST BASIS CONTRIBUTION BASIS EXCLUDES CEN-VI-RO CONTRIBUTIONS.

FIRST OF ALL, WHAT DOES 16-A THROUGH -D REPRESENT?

A WELL, THESE WOULD BE THE ACTUAL WORKSHEETS FOR CALCULATING THE WITHDRAWAL LIABILITY FOR CONCRETE PIPE & PRODUCTS BASED ON THE CALCULATIONS OF THE PRESENT VALUE OF VESTED BENEFITS THAT WE DID ON USING THE BUCK FORWARD INTEREST RATES.

[p. 196] Q WHERE WOULD APPLICATION OF THE BUCK FORWARD INTEREST RATES APPEAR IN TERMS OF THE SEVEN ITEMS ON EACH OF EXHIBITS 16-A THROUGH -D?

A IT WOULD HAVE AFFECTED ITEM –

Q LET ME REPHRASE THAT, BECAUSE THE BUCK FORWARD INTEREST RATES ARE ONLY ON 16-A AND -B.

A THANK YOU. IT WOULD AFFECT ITEMS FOUR AND ANY ITEM BELOW THAT. IT DIRECTLY

AFFECTED FOUR, AND THE OTHERS FOLLOW NATURALLY, IF YOU JUST FOLLOW THE CALCULATION WORKSHEETS.

Q I GUESS FOR EVERYBODY'S BENEFIT, AS LONG AS WE'RE PROCEEDING INFORMALLY, THE ENTRIES ARE TAKEN FROM THE WORKSHEET AND SHOULD BE IN ROUGHLY THE SAME ORDER AS, I GUESS, EXHIBIT 7-A.

MR. BEERS: 7-A. AT A GLANCE, IT LOOKS LIKE IT'S THE SAME FORMAT –

THE WITNESS: WE TRIED TO FOLLOW THE FORMAT AS CLOSELY AS POSSIBLE, AND MY APOLOGIES FOR INTERRUPTING COUNSEL.

Q BY MR. NELSON: I NOTICE ON 16-A, THE SECOND LINE OF ENTRY NUMBER FOUR IS IN PARENTHESES? WHAT DOES THAT SIGNIFY?

A THAT WAS A NEGATIVE POOL AT THAT POINT IN TIME.

Q WHEN YOU SAY A NEGATIVE POOL, WHAT DOES THAT MEAN?

[p. 197] A WELL, THE TOTAL UNFUNDED VESTED LIABILITY AS OF THAT POINT IN TIME WAS ACTUALLY LESS THAN ON THE POOL THAT WAS ALREADY, THE RESIDUAL POOL THAT WAS BEGAN DECEMBER 31ST, 1979. AND OF COURSE THAT POOL WAS DECREASED BY FIVE PERCENT, AND THAT GAVE US THE 288 MILLION 786 THOUSAND 182 FIGURE. AND ESSENTIALLY 4-B IS A BALANCING ITEM TO GET YOU TO THE UNFUNDED VESTED LIABILITY.

AND JUST BECAUSE THE INTEREST RATES HAD RISEN, THE POOL HAD – THE P.B.G.C. INTEREST RATES UNDERLYING – EXCUSE ME, INTEREST RATES IN THE MARKETPLACE HAD RISEN OVER THAT PERIOD, AND THAT CAUSED THE UNFUNDED VESTED BENEFIT TO DROP. AND THAT ESSENTIALLY RESULTED IN A NEGATIVE POOL.

Q WHERE DID THE ENTRIES THAT FOLLOW ENTRY NUMBER TWO ON EXHIBIT 16-A COME FROM?

A THEY WERE TAKEN FROM EXHIBIT 7, I BELIEVE IT IS.

Q 7-A? THE ORIGINAL WORKSHEET?

A 7-A, HANG ON. YES.

Q WITH RESPECT TO EXHIBIT 16-A, WHERE WOULD THE NUMBERS USED IN ITEM NUMBER 3 HAVE COME FROM?

A IT'S A SIMPLE ARITHMETIC OPERATION AS DESCRIBED.

Q WHAT IS THE DIFFERENCE BETWEEN EXHIBIT 16-A AND 16-B?

[p. 198] A THAT 16-A INCLUDES THE CEN-VI-RO CONTRIBUTIONS, AND 16-B EXCLUDES THEM. OTHER THAN THAT, THE ONLY DIFFERENCE IS WHAT RESULTS FROM FOLLOWING THE FORM AND DOING THE CALCULATIONS ACCORDING TO THE FORM. IT'S ONLY INPUT DIFFERENCE.

Q THE RESULT ON LINE 17 OF 16-A AND 16-B IS DIFFERENT. WHAT ACCOUNTS FOR THE DIFFERENCE?

A IN ESSENTIALLY THE CONCRETE PIPE & PRODUCTS' SHARE OF THE EMPLOYER WITHDRAWAL LIABILITY IS LESS IN 16-B BECAUSE THEIR CONTRIBUTIONS WERE CALCULATED EXCLUDING THE CEN-VI-RO CONTRIBUTIONS.

SO, IN OTHER WORDS, JUST 1-A AND 1-B ARE ESSENTIALLY ON 16-B ARE LESS THAN 1-A AND 1-B ON 16-A, AND THE REST FOLLOWS ARITHMETICALLY.

Q WITH RESPECT TO 16-C, CAN YOU TELL US WHAT EXHIBIT 16-C DEPICTS?

A WELL, THE CALCULATION BASIS HERE, INSTEAD OF BEING EITHER THE BUCK FORWARD INTEREST RATES THAT WERE USED IN 16-A AND 16-B, OR THE BLENDED RATES THAT SEGAL USED, WHICH WERE PART P.B.G.C. RATES AND PART THE SIX PERCENT FUNDING ASSUMPTION, WE'VE NOW USED PURELY THE P.B.G.C. RATES IN CALCULATING THE PRESENT VALUE OF – OR THE UNFUNDED VESTED LIABILITY IN LINE FOUR.

Q IS THE DIFFERENCE BETWEEN 16-C AND 16-D THE INCLUSION OF THE CEN-VI-RO CONTRIBUTIONS?

[p. 199] A YES. THE SAME DIFFERENCE AS BETWEEN "A" AND "B," 16-A AND 16-B.

I MIGHT ADD I'M NOT TRYING TO RECOMMEND THE P.B.G.C. RATES, BUT IT WAS JUST A VERY EASY

CALCULATION BASED ON THE WORK THAT SEGAL HAD ALREADY DONE.

Q WOULD USE OF THE P.B.G.C. RATE IN THE WITHDRAWAL LIABILITY ASSUMPTIONS USED MAKE THE TRUST FUNDS ASSUMPTIONS IN THIS CASE REASONABLE IN THE AGGREGATE?

A NO, I DON'T THINK SO. AS I SAY, I THINK THE BUCK FORWARD INTEREST RATES ARE THE MINIMUM REASONABLE ASSUMPTIONS, INTEREST ASSUMPTION.

Q ARE YOU FAMILIAR WITH SOMETHING CALLED A "WYATT REPORT"?

A YES, I AM.

Q DO YOU HAVE ONE ON YOU?

A I DO HAVE – YOU MAY FIND IT IN MY GREEN FOLDER THERE, OR PERHAPS MY BRIEFCASE, IF I MAY BE EXCUSED?

THE ARBITRATOR: GO AHEAD. OFF THE RECORD.

(BRIEF PAUSE.)

THE ARBITRATOR: OKAY.

Q BY MR. NELSON: I GUESS WE'LL HAND YOU WHAT IS EXHIBIT 4, FUND EXHIBIT 4, WHICH HAS BEEN REPRESENTED AS BEING THE WYATT REPORT FOR 1982 SURVEY [p. 200] OF ACTUARIAL ASSUMPTIONS AND FUNDING. ARE YOU FAMILIAR WITH THE WYATT COMPANY REPORTS?

A YES. I BELIEVE I'VE EVEN SEEN THIS PARTICULAR REPORT BEFORE.

Q ARE ASSUMPTIONS CONTAINED IN FUND EXHIBIT 4 AN APPROPRIATE MEASURE OF THE CORRECT INTEREST RATE TO USE IN CALCULATING WITHDRAWAL LIABILITY?

A I MISSED SOMETHING. AT THE START OF YOUR QUESTION YOU SAID FUND EXHIBIT 4, OR SOMETHING LIKE THAT?

Q I'M SORRY. WHY DON'T I REPHRASE THE WHOLE QUESTION. I'M MUMBLING TO MYSELF.

ARE THE ACTUARIAL ASSUMPTIONS CONTAINED IN TRUST FUND EXHIBIT 4, WHICH IS THE WYATT REPORT, AN APPROPRIATE MEASURE OF THE CORRECT INTEREST RATE TO USE IN CALCULATING WITHDRAWAL LIABILITY?

A NO, NOT AT ALL. THE PURPOSE OF THE SURVEY WAS TO PROVIDE A SURVEY OF ACTUARIAL ASSUMPTIONS FOR THE ONGOING PENSION EVALUATION, WHICH IS A DIFFERENT PROCESS THAN THE WITHDRAWAL LIABILITY CALCULATION. MOREOVER, I DON'T THINK THE – THE ASSUMPTIONS USED FOR FUNDING ARE APPROPRIATE, A PRIORITY FOR WITHDRAWAL LIABILITY CALCULATIONS.

MR. NELSON: I GUESS I'D LIKE TO MOVE TO THE EXTENT NECESSARY MOVE FOR THE INTRODUCTION OF EXHIBITS 15 AND 16-A THROUGH -D.

[p. 201] THE ARBITRATOR: ANY OBJECTION?

MR. BEERS: NO OBJECTION.

THE ARBITRATOR: 15 AND 16 ARE RECEIVED.

(WHEREUPON, COMPANY EXHIBITS 15 AND 16-A THROUGH 16-D WERE RECEIVED IN EVIDENCE.)

(BRIEF PAUSE.)

Q BY MR. NELSON: WITH RESPECT TO THE PAST SERVICE CREDITS FOR UNRECORDED PRIOR SERVICE, WHAT WOULD BE THE IMPACT OF ELIMINATING THOSE CREDITS FROM THE AGGREGATE UNFUNDED VESTED LIABILITY POOLS?

A THAT WOULD DECREASE THE WITHDRAWAL LIABILITY.

MR. NELSON: I HAVE NOTHING FURTHER.

MR. BEERS: THAT'S ALL YOUR QUESTIONS?

MR. NELSON: YES.

MR. BEERS: IF WE COULD JUST HAVE FIVE MINUTES.

THE ARBITRATOR: SURE.

(SHORT RECESS.)

THE ARBITRATOR: BACK ON THE RECORD. MR. BEERS.

CROSS-EXAMINATION

BY MR. BEERS:

Q ONE OF THE THINGS I NOTICED IN YOUR DIRECT TESTIMONY IS THERE WAS NO MENTION OF THE CONCEPT THE SEGAL COMPANY USES IN DETERMINING HOW TO VALUE THE FUND. THAT IS, THEY HAVE ONE RATE THAT THEY USE FOR [p. 202] ASSETS THAT THEY HAVE ON HAND, THAT THEY CAN GO OUT AND USE SOME KIND OF MARKET INSTRUMENT TO GET A VALUE. AND THEY HAVE A DIFFERENT RATE FOR FUNDS THAT AREN'T HERE TODAY, WHICH, AS A MATTER OF COURSE, YOU CAN'T JUST GO OUT AND BUY THE BOND. YOU DON'T KNOW WHAT THE INTEREST RATE IS GOING TO BE TOMORROW OR THE NEXT DAY.

HOW DO YOU ACCOUNT FOR THAT IN YOUR CALCULATIONS OF WITHDRAWAL LIABILITY AND THE REASONABLE RATES TO USE TO DETERMINE UNFUNDED VESTED LIABILITY WHEN YOU CAN'T USE THESE RATES WHEN YOU DON'T HAVE ENOUGH ASSETS TO FUND THE PLANNING?

MR. NELSON: I'M NOT SURE IF I SHOULD OBJECT TO THAT AS BEING COMPOUND.

MR. BEERS: THE LAST PHRASE.

THE ARBITRATOR: LET'S ASK THE WITNESS.

DO YOU UNDERSTAND WHAT THE QUESTION WAS?

THE WITNESS: YES.

THE ARBITRATOR: OKAY.

THE WITNESS: I FIND IT TO BE NO PROBLEM AT ALL. THE BASIC PRINCIPLE OF ANY KIND OF PRESENT VALUE CALCULATION IN ACTUARIAL SCIENCE, WHETHER IT BE ONGOING VALUATIONS OR WITHDRAWAL CALCULATIONS, IS TO DETERMINE THE AMOUNT OF MONEY THAT YOU NEED TO DO SOMETHING TODAY. SO THAT'S WHAT IT'S ALL ABOUT. AND THE POINT IS, IF ANY WITHDRAWING EMPLOYER PAID THAT [p. 203] MONEY AT THAT POINT IN TIME, THAT COULD BE USED TO PURCHASE THOSE BONDS.

Q BY MR. BEERS: BUT IN VALUING THE PLAN, THE UNFUNDED VESTED LIABILITY OF THE PLAN, IF MONEY IS NOT ON HAND TO BUY AN INVESTMENT, ARE YOU SAYING IT'S REALISTIC TO USE A MARKET RATE IN EXISTENCE, THEN TO DETERMINE THE INVESTMENT RETURN YOU COULD GET FIVE YEARS OR TEN YEARS HENCE WHEN THE MONEY IS IN HAND; IS THAT CORRECT?

A YES.

Q AND YOU THINK THAT'S REASONABLE?

A WELL, YES, IT'S REASONABLE, BECAUSE THE WHOLE PURPOSE, AS I EXPLAINED, IS TO DETERMINE HOW MUCH YOU'RE SUPPOSED TO HAVE TODAY. IF YOU DID HAVE IT TODAY, YOU COULD INVEST IT TODAY. THE FACT THAT SOMEBODY DOESN'T HAVE IT TODAY IS ADJUSTED BY INTEREST PAYMENTS OVER THE INTERVENING YEARS THEN.

IF IT'S NOT PAID, THEN, I MEAN, IT SEEMS FAIR THAT ONCE A WITHDRAWAL LIABILITY IS DUE,

THERE WOULD BE AN ADJUSTMENT FOR INTEREST OVER ANY PERIOD THAT IT'S NOT PAYABLE. BUT ALL ACTUARIAL PRESENT VALUES ARE BASED ON THE PREMISE OF DETERMINING WHAT'S DUE TODAY. AND IN A TYPICAL ONGOING VALUATION, FOR INSTANCE, I HAVE NEVER HEARD ANY ACTUARY, AND THEY'RE ALWAYS DOING PRESENT VALUES, DIFFERENTIATE BETWEEN MONEY THEY HAVE AND MONEY THEY DON'T HAVE.

[p. 204] Q WHEN YOU SAY YOU HAVEN'T HEARD ANY OTHER ACTUARY DO THAT –

A FOR AN ONGOING VALUATION.

Q – ARE YOU TALKING ABOUT THE SEGAL COMPANY? WHAT ABOUT THEM?

A FOR AN ONGOING – I WOULD BE SURPRISED IF THEY DIFFERENTIATED BETWEEN MONEY THEY HAD AND MONEY THEY DIDN'T HAVE FOR ONGOING VALUATION AND USING DIFFERENT RATES.

Q FOR WITHDRAWAL LIABILITY PURPOSES, IN DETERMINING HOW REASONABLE RATES ARE AND DETERMINING WITHDRAWAL LIABILITY, DO YOU CONSIDER WHAT OTHER ACTUARIES HAVE USED IN COMING UP WITH WHAT YOU CONSIDER TO BE A REASONABLE AMOUNT?

A WELL, I MEAN, I LOOK AT IT AND I UNDERSTAND THERE'S A LOT OF COMFORT IN BEING IN A HERD, BUT IF THE HERD ISN'T LOOKING AT ECONOMIC REALITY, I WILL NOT JOIN THE HERD.

Q WHAT DO YOU UNDERSTAND REASONABLE TO MEAN?

A REASONABLE WOULD MEAN THAT WHICH YOU COULD - YOUR BEST ESTIMATE OF WHAT THE FUND COULD REALLY EXPECT TO EARN.

Q IN THE MOST EXTREME HYPOTHETICAL, YOU SAID THE BEST YOU CAN EXPECT THE FUND TO EARN; IS THAT CORRECT?

A NO. YOUR BEST ESTIMATE OF WHAT THE FUND [p. 205] COULD EARN. MY ESTIMATE OF THE BEST THE FUND COULD EARN WOULD BE SO HIGH AS TO TOTALLY WIPE OUT THESE WITHDRAWAL LIABILITIES WITHOUT QUESTION.

Q THAT'S ONE NUMBER YOUR BEST ESTIMATE?

A NO. THERE'S CERTAINLY A RANGE, AS I POINTED OUT. I'VE GIVEN MY MINIMUM INTEREST ASSUMPTION. I WOULD CERTAINLY BE MORE COMFORTABLE WITH SOME HIGHER INTEREST ASSUMPTIONS, BASED ON THE FACT THAT THE FUND COULD, YOU KNOW, INVEST IN TRIPLE "A" CORPORATE BONDS THAT EARN MORE THAN U.S. SECURITIES OR INVEST IN EQUITIES WHICH HISTORICALLY HAVE EARNED SIX OR SEVEN PERCENT MORE THAN GOVERNMENT SECURITIES, ACCORDING TO THE IBBOTSON AND SINQUEFELD, I-B-B-O-T-S-O-N AND S-I-N-Q-U-E-F-E-L-D, STUDIES OUT OF THE UNIVERSITY OF CHICAGO. THEY'RE CONSIDERED BY ANY PENSION EXPERT I KNOW, EITHER ON THE LIABILITY SIDE, IN OTHER WORDS, ACTUARIES OR INVESTMENT MANAGERS, TO BE THE BIBLE.

Q YOU'RE GOING TO HAVE TO HELP ME, BECAUSE I DON'T UNDERSTAND YOUR IDEA OF

REASONABLENESS. YOU'RE SAYING THAT YOUR BEST ESTIMATE IS WHAT IS REASONABLE, EVEN IF IT'S THE ONLY ESTIMATE AT THAT AMOUNT; IS THAT CORRECT?

A I DON'T UNDERSTAND YOUR QUESTION.

MR. NELSON: COULD I TAKE A SHOT?

MR. BEERS: SURE, GO AHEAD.

MR. NELSON: I THINK WHAT YOU'RE - MAYBE I'M NOT [p. 206] UNDERSTANDING THE QUESTION, BUT I THINK WHAT YOU'RE GETTING AT HERE IS THE QUESTION OF WHETHER YOU DEFINE REASONABLE AS BEING WHAT OTHER ACTUARIES ARE DOING OR WHAT HE PERCEIVES TO BE AVAILABLE IN THE MARKETPLACE, IRRESPECTIVE OF WHETHER OTHER ACTUARIES ARE DOING IT.

MR. BEERS: THAT'S PART OF IT. LET ME RESTATE THE QUESTION.

Q IS ONE OF THE FACTORS YOU CONSIDER IN DETERMINING WHAT A REASONABLE RATE IS IS WHAT OTHER ACTUARIES ARE HOLDING TO BE REASONABLE RATES?

A NOT REALLY.

Q SO IF YOU WERE THE ONLY ONE TO HOLD THAT A PARTICULAR RATE WAS REASONABLE, YOU WOULD STILL FEEL THAT FITS IN THE DEFINITION OF WHAT REASONABLE IS?

A YES. I WOULD BE VERY - I WOULD TAKE EXTREME CARE IN THAT SITUATION, BECAUSE I DID

NOT HAVE THE COMFORT OF THE HERD THAT I WAS RIGHT AND HAD A DEFENSIBLE POSITION. I WOULD REALLY DO A LOT OF DEEP SOUL-SEARCHING AS I HAVE. BUT THAT DOESN'T MEAN - YOU HAVE TO UNDERSTAND -

Q I THINK THAT BLENDS INTO ANOTHER QUESTION THAT I HAVE.

MR. NELSON: LET HIM FINISH THE ANSWER.

THE ARBITRATOR: LET HIM FINISH THE ANSWER.

THE WITNESS: YOU HAVE TO UNDERSTAND IN THIS KIND [p. 207] OF CALCULATION THE ACTUARY IS REPRESENTING THE TRUST FUND, WHICH IS TRULY COMPOSED OF LABOR AND MANAGEMENT. LABOR AND MANAGEMENT BOTH BENEFIT FROM CONSERVATISM. YOU HAVE MARKET PRESSURES THAT ESSENTIALLY DEAL ACROSS THE HERD OF PROFESSIONALS THAT WOULD CAUSE THINGS TO BE LOW.

THE WITHDRAWING - THE WITHDRAWING EMPLOYER WOULD BE THE ONLY ONE WHO WOULD BE HARMED BY BEING CONSERVATIVE, AND THEY REALLY HAVE NO REPRESENTATION. SO I THINK THERE'S A BUILT-IN BIAS, IF ACTUARIES ARE HUMAN, TO BE LOW, AND I THINK THAT'S WHY THE HERD IS LOW.

Q BY MR. BEERS: WELL, LET ME TAKE ANOTHER APPROACH TO IT. YOU WERE SAYING

THAT THE P.B.G.C. RATES WERE NOT REASONABLE; IS THAT CORRECT?

A YEAH, I THINK THEY ARE NOT REASONABLE, THAT IS CORRECT.

Q YOU WERE SAYING THAT'S BECAUSE, AS YOU PHRASED IT, THE COMPETITIVE RATES ARE A POINT HIGHER; IS THAT CORRECT?

A YEAH.

Q WHAT DO YOU REALLY MEAN BY COMPETITIVE RATES? YOU MEAN THE HIGHEST RATES?

A WELL, IF YOU DID ANY KIND OF SURVEY, I MEAN, PROFESSIONALS IN THE INVESTMENT AND ACTUARIAL AREAS GENERALLY KNOW WHO THE PROFESSIONALS WERE. AND IF [p. 208] YOU CHOSE TEN COMPANIES THAT ARE KNOWN TO BE ACTIVE IN THE MARKETPLACE, YOU WOULD GET ESSENTIALLY A SURVEY THAT WOULD MORE APPROPRIATE TO BE USED BY THE P.B.G.C. AGAIN, THE P.B.G.C. HAS GOT EVERY ADVANTAGE IN BEING CONSERVATIVE. SO THEY DESIGN THEIR SURVEY TO BE CONSERVATIVE.

Q SO WHEN YOU SAY THE FIVE MOST COMPETITIVE RATES, YOU MEAN THE FIVE HIGHEST?

A THE FIVE LOWEST BIDS ON A DOLLAR BASIS, AND THAT WOULD EQUATE TO THE FIVE HIGHEST INTEREST ASSUMPTIONS.

Q YOU DON'T CONSIDER THAT THE AVERAGE RATES USED BY THE P.B.G.C. WOULD BE REASONABLE?

A NO, I THINK I EXPLAINED WHY. SHOULD I GO OVER THAT AGAIN?

Q NO, THAT'S FINE.

MR. NELSON: LET ME - WHEN YOU SAY REASONABLE, YOU'RE TALKING ABOUT REASONABLE AS AN INTEREST ASSUMPTION, NOT REASONABLE IN THE COSMIC SENSE OF WHAT THE GOVERNMENT AGENCY DOES IS -

MR. BEERS: NO. REASONABLE BEING USED IN WITHDRAWING LIABILITY.

THE WITNESS: YES, THAT'S EXACTLY THE WAY I MEANT IT, AND YOU'RE RIGHT, IF I WAS IN THE P.B.G.C., I WOULD BE WORKING FOR LOW INTEREST RATES TOO.

Q BY MR. BEERS: ONE OF THE THINGS THAT ALSO [p. 209] BOTHERED ME WAS, AS FAR AS THE WYATT STUDY GOES - NOW, OF COURSE IT'S TRUE THAT THAT'S NOT A STUDY OF RATES USED IN WITHDRAWAL LIABILITY FUNDING, WITHDRAWAL LIABILITY DETERMINATIONS. WHAT THAT IS IS A STUDY OF RATES USED AS FUNDING ASSUMPTIONS; IS THAT CORRECT?

A YES.

Q AS FAR AS THAT BEING A STUDY OF RATES FOR FUNDING ASSUMPTIONS, DO YOU CONSIDER THE CONCLUSIONS REACHED IN THERE - DO YOU CONSIDER THE RATES REFLECTED IN THERE TO BE REASONABLE RATES FOR FUNDING ASSUMPTIONS?

A THEY'D BE WITHIN - SOME OF THEM CERTAINLY ARE. SOME OF THEM I WOULD PROBABLY - I MEAN, IT'S A SURVEY OF THOUSANDS, I PRESUME THOUSANDS OF PLAN ASSUMPTIONS. I WOULD ASSUME MOST OF THEM ARE REASONABLE FOR FUNDING PURPOSES.

Q TURNING TO, UNFORTUNATELY THE PAGES AREN'T NUMBERED, BUT TURNING THROUGH IT TO A PAGE THAT STARTS UP IN THE TOP LEFT-HAND CORNER WHERE IT SAYS "CHANGES IN INTEREST RATE."

A YES.

MR. NELSON: HOLD ON. I HAVEN'T FOUND IT YET.

MR. BEERS: THE NEXT TITLE IS AVERAGE INTEREST RATES.

Q LOOKING AT THE TABLE THERE, YOU HAVE AN [p. 210] ENTRY FOR 10,000 OR MORE ACTIVE PLAN PARTICIPANTS.

A YES.

Q AND A COLUMN TO THE RIGHT SIDE FOR NONPAY-RELATED PLANS. FOR THE 1981 SURVEY IT HAS 6.1 PERCENT.

MR. NELSON: OKAY.

Q BY MR. BEERS: IS THAT A REASONABLE FUNDING ASSUMPTION?

MR. NELSON: I OBJECT AS BEING AMBIGUOUS. IN RELATION TO WHAT?

MR. BEERS: IN RELATION TO DETERMINING THE ACTUARIAL EVALUATION OF A PLAN BACK IN 1981 IN DEVELOPING THEIR INVESTMENT STRATEGIES AND PREDICTING FUTURE EARNING CAPABILITY.

MR. NELSON: I DON'T WANT TO GET UNDUE - AND I HAVEN'T HAD THE BENEFIT OF ANALYZING THIS REPORT IN ANY DETAIL, BUT IT LOOKS TO ME LIKE WHAT WE'RE TALKING ABOUT HERE IS A SURVEY OF AN UNKNOWN NUMBER OF PLANS OF UNKNOWN CHARACTERISTICS.

MR. BEERS: IT'S 813 PLANS.

MR. NELSON: 813 PLANS OF UNKNOWN CHARACTERISTICS.

MR. BEERS: EXCEPT THEY ARE KNOWN CHARACTERISTICS. YOU HAVE PLANS RELATED TO PAY, PLANS THAT ARE NONPAY-RELATED, IT'S BROKEN FAIRLY SPECIFICALLY. IS THERE A PROBLEM WITH HIM ANSWERING [p. 211] THE QUESTION?

THE ARBITRATOR: LET'S FIND OUT WHETHER THE WITNESS IS FAMILIAR WITH THIS.

MR. NELSON: MAYBE I'M BEING OVERLY TECHNICAL HERE, BECAUSE I HAVEN'T READ IT YET.

THE ARBITRATOR: IF THE WITNESS IS FAMILIAR WITH IT, THEN IT REALLY DOESN'T MATTER WHETHER COUNSEL IS.

MR. NELSON: THAT'S TRUE. COULD I HEAR THE QUESTION ONE MORE TIME?

Q BY. MR. BEERS: IS THE 6.1 PERCENT ENTRY THERE ON THE LINE FOR 10,000 OR MORE PLAN PARTICIPANTS THAN THE NONPAY-RELATED PLANS? IS THAT A REASONABLE FUNDING ASSUMPTION?

A ASUMING ALL OTHER ASSUMPTIONS WERE REASONABLE FOR THE PLAN, I WOULD SAY THAT WAS AT AN EXTREME LOW END OF WHAT I WOULD CONSIDER REASONABLE.

Q LOOKING AT THAT, ISN'T THAT THE AVERAGE FUNDING ASSUMPTION USED BY THOSE PLANS DURING THAT YEAR?

A YES.

Q I NOTICE FROM YOUR RESUME THAT YOUR BACKGROUND IS CHIEFLY IN WORKING WITH GOVERNMENT SPONSORED RETIREMENT PLANS; IS THAT CORRECT?

A I'D SAY I SPEND ABOUT HALF MY TIME IN THE GOVERNMENT SECTOR, AND THE OTHER HALF IN THE PRIVATE [p. 212] SECTOR.

Q YOUR TIME IN THE PRIVATE SECTOR HAS BEEN SPENT RECENTLY OR SOMETHING, THAT'S WHY IT'S NOT ON YOUR RESUME?

A IT'S ON THE RESUME. THERE WAS ONE FORTUNE 100 COMPANY, WHERE I SPEND AN AWFUL LOT OF TIME.

Q WITH A SINGLE EMPLOYER PLAN?

A YES. THEY HAD MANY, MANY PLANS.

Q BUT CHIEFLY SINGLE EMPLOYER PLANS?

A YES.

Q IS THERE ANY WITHDRAWAL LIABILITY FOR GOVERNMENT PENSION PLANS?

A NO, THE CONCEPT IS NOT APPROPRIATE.

Q IS THERE ANY WITHDRAWAL LIABILITY FOR SINGLE EMPLOYER PLANS?

A NO. I MEAN, THERE'S A SIMILAR CONCEPT THAT WOULD APPLY THE SAME ACTUARIAL AND ECONOMIC TECHNIQUE, BUT THERE IS NO CALCULATION OF A, YOU KNOW, EMPLOYER WITHDRAWAL LIABILITY.

Q THAT TECHNIQUE WOULD INVOLVE THESE P.B.G.C. RATES TO DETERMINE WHETHER SINGLE EMPLOYER PLAN TERMINATION WAS APPROPRIATE?

A YES.

MR. BEERS: NO FURTHER QUESTIONS.

MR. NELSON: NOTHING FURTHER.

THE ARBITRATOR: I HAVE A QUESTION.

[p. 213] THESE FELLOWS ARE ALL EXPERTS IN THE FIELD, BUT THERE ARE A COUPLE OF THINGS YOU'LL HAVE TO EXPLAIN TO ME, BECAUSE I'M NOT QUITE SURE I UNDERSTAND. FOR THE PURPOSE OF MY UNDERSTANDING, AND HOW YOU'RE USING THE WORD "REASONABLE" IS IMPORTANT,

BECAUSE I THINK WHEN YOU LOOK AT THE STATUTE IN SECTIONS 4221 AND 4213, IT MAKES REFERENCE TO REASONABLENESS. ARE YOU USING THE TERM REASONABLE IN THE SENSE THAT THE STATUTE TALKS ABOUT, OR ARE YOU USING IT IN ANOTHER CONTEXT?

THE WITNESS: I'M TRYING TO ABIDE BY THE STATUTE.

THE ARBITRATOR: I JUST WANTED TO MAKE SURE THAT WE UNDERSTOOD THAT.

MR. BEERS: IS IT OKAY IF I ASK ANOTHER QUESTION?

THE ARBITRATOR: I HAVE ONE MORE QUESTION, AND THEN YOU CAN GO AHEAD.

MR. BEERS: GO AHEAD.

THE ARBITRATOR: I'M LOOKING AT YOUR COMPANY EXHIBIT 15, WHICH IS CALLED THE BUCK FORWARD INTEREST RATE INDEX.

THE WITNESS: UH-HUH.

THE ARBITRATOR: AGAIN, YOU'LL HAVE TO FORGIVE, BECAUSE I'M NOT VERY GOOD AT FIGURES, SO I DON'T ALWAYS UNDERSTAND WHAT I READ.

[p. 214] I WAS LOOKING AT TABLE ONE AND LOOKING AT 9-1-81, WHERE YOU HAVE EQUIVALENT RATES FOR COMPOSITE OF 15.4 AND THEN YOU HAVE FORWARD RATE IN YEAR FIVE OF 15.9, OKAY?

THE WITNESS: I'M SORRY, WHAT DATE?

THE ARBITRATOR: 9-1-81. READING ACROSS.

THE WITNESS: YES.

THE ARBITRATOR: IN THE FIRST YEAR IN THE FORWARD RATE IN YEAR ONE, YOU HAVE 18.3. AND THEN FIVE YEARS LATER IT'S 15.9.

THE WITNESS: RIGHT.

THE ARBITRATOR: AGAIN, YOU'RE TALKING IN TERMS OF GOVERNMENT BONDS AND TREASURY BILLS AND THINGS OF THAT SORT.

I WAS LOOKING AT THE FIGURE FOR 9-1-86, WHERE WE HAVE THE YEAR ONE IS 5.6 AND FIVE-YEAR PERIOD IS 7.9.

THE WITNESS: UH-HUH.

THE ARBITRATOR: THESE ARE ACTUAL FIGURES YOU'RE TALKING ABOUT NOW, AREN'T THEY?

THE WITNESS: YES.

THE ARBITRATOR: ISN'T IT TRUE THAT WHEN AN ACTUARY DETERMINES IN PENSION FUNDS INTEREST ASSUMPTIONS, THAT HE DOESN'T LOOK IN PERIOD OF SHORT PERIODS, HE LOOKS IN PERIODS OF LONG PERIODS, DOES HE NOT?

[p. 215] THE WITNESS: YES.

THE ARBITRATOR: YOU DON'T CHANGE YOUR INTEREST ASSUMPTION EVERY YEAR, DO YOU?

THE WITNESS: WELL, IN A TYPICAL EVALUATION PROCESS YOU WOULD NOT, BECAUSE

FRANKLY THERE'S - YOU KNOW IF YOU ARE MISSED TODAY, YOU'LL CATCH UP TOMORROW. AND SO FOR SIMPLICITY OF CALCULATIONS, ACTUARIES TYPICALLY USE ONE INTEREST RATE, SIX PERCENT OR SOMETHING LIKE THAT.

TO TRY TO PUT A LOT OF ACCURACY - IN THIS KIND OF CALCULATION, I MEAN, ACTUAL MONEY CHANGES HANDS, AND I THINK IT'S IMPORTANT TO INTRODUCE MORE PRECISION INTO THE PROCESS. AND SO WE ACTUALLY HAVE CHANGED INTEREST RATES EVERY YEAR IN OUR CALCULATIONS.

THE ARBITRATOR: I REALIZE YOU HAVE IN YOUR CALCULATIONS.

THE WITNESS: NORMALLY THAT WOULD NOT BE DONE, YOU'RE RIGHT.

THE ARBITRATOR: I'M TALKING ABOUT MEPA [SIC] AND MULTI-EMPLOYER PLANS, AS OPPOSED TO SOMETHING ELSE.

THE WITNESS: ALL RIGHT.

THE ARBITRATOR: BECAUSE I RECALL THERE WAS A PERIOD OF TIME WHEN THE TRUST FUNDS WENT AWAY FROM EQUITY AND WENT TO TREASURY BILLS AND CD'S, BECAUSE THE INTEREST RATES WERE 16 AND 17 PERCENT, WHEREAS [p. 216] YOU WEREN'T GETTING ANYTHING LIKE THAT IN YOUR EQUITY.

BUT LOOKING AT THE LONG RUN, THE INTEREST ASSUMPTIONS, BECAUSE YOU HAPPEN TO GET 13, 14, 15 PERCENT INTEREST, AS I RECALL WAS NOT

CHANGED BY THE ACTUARIES BECAUSE THEY'RE LOOKING FOR THE LONG VIEWPOINT. AND THEY CAME UP WITH AN ASSUMPTION THAT I THOUGHT THE WHOLE THEORY WAS THAT IT'S BASED ON THE – ON THE SITUATION OF A LONG PERIOD OF TIME RATHER THAN TWO, THREE, FOUR YEARS.

THE WITNESS: YOU'RE RIGHT. LET ME EXPLAIN, AND I THINK IF THERE'S ANY APPEARANCE OF CONFLICT IN MY TESTIMONY BETWEEN WHAT HAPPENS IN AN ONGOING VALUATION AND WHAT HAPPENS ON A WITHDRAWAL LIABILITY, I THINK I CAN EXPLAIN THAT.

THE ARBITRATOR: I'D LIKE TO HEAR THAT.

THE WITNESS: ON THE – ON THE ONGOING VALUATION, YOU NOT ONLY, AS COUNSEL POINTED OUT, YOU HAVE MONEY COMING IN IN THE FUTURE, BUT YOU HAVE BENEFITS EARNED IN THE FUTURE. AND THAT'S REALLY WHAT CREATES THE NEED FOR CONSERVATISM, IF YOU WILL, BECAUSE YOU DON'T KNOW WHAT INTEREST RATE YOU CAN EARN ON THOSE MONIES AT THAT TIME.

YOU ALSO HAVE A REINVESTMENT PROBLEM BECAUSE, YOU KNOW, THE FUND IS AN ONGOING FUND AND YOU'RE PUTTING NEW MONEY IN ALL THE TIME, AND YOU [p. 217] HAVE REINVESTMENTS, AND THAT CREATES SOME UNCERTAINTY INTO THE FUTURE.

AND SO THAT'S WHY PEOPLE – ACTUARIES ARE SO CONSERVATIVE COMPARED TO REALLY WHAT I THINK THEY MIGHT REALLY SAY AS THEIR BEST

GUESS. I MEAN, I DON'T KNOW WHY YOU SHOULD SAY FOUR PERCENT LIKE THE P.B.G.C. DOES FAR OUT INTO THE FUTURE, ASSUMING WHY SHOULD THEY FORECAST INTEREST RATES COMING WAY DOWN. IT WOULD BE JUST AS EASY TO FORECAST THEIR GOING WAY – GOING UP.

IN THAT ONGOING VALUATION YOU HAVE BENEFITS EARNED IN THE FUTURE AND YOU HAVE A LOT OF REINVESTMENTS. THIS IS DIFFERENT FROM THE POINT COUNSEL IS MAKING ABOUT YOU DON'T HAVE ALL THE MONEY TODAY. THE POINT IS, THE WHOLE POINT OF THIS WITHDRAWAL CALCULATION IS HOW MUCH IN EXHIBIT 16-A, -B, -C AND -D, THE WHOLE THING IS MAKE US WHOLE TODAY. THAT'S WHAT THE WHOLE POINT OF THESE CALCULATIONS IS.

SO THEY'VE GOT THE MONEY ON HAND, THEORETICALLY. AND THAT'S WHY IT'S APPROPRIATE TO USE THESE HIGHER ASSUMPTIONS THAT ARE IN THE MARKETPLACE TODAY AND NO NEED TO INTRODUCE ANY CONSERVATISM. IN THE ONGOING VALUATION, YOU'VE GOT BENEFITS THAT ARE GOING TO BE EARNED IN THE FUTURE, THAT'S NOT APPROPRIATE TO THIS. YOU HAVE [p. 218] REINVESTMENTS.

IN A WITHDRAWAL LIABILITY SITUATION, IF YOU'RE JUST MEASURING THOSE BENEFITS, THE CASH FLOW WOULD BE USED TO PAY THE BENEFITS, THERE'S NO NEW MONEY COMING IN. I MEAN, I'M OVERSIMPLIFYING A LITTLE BIT. YOU MAY HAVE TO REINVEST A LITTLE BIT SOMETIMES. BUT THERE'S

NO NEED FOR THE CONSERVATISM IN THIS TYPE OF THING.

THE CONCEPT OR THE PHENOMENON THAT YOU'RE DISCUSSING COMES ABOUT IN THE ACTUARIAL EVALUATION ON ONGOING PLANS. I THINK EVERYBODY'S USED TO THAT, EVERYBODY DOES IT EVERY YEAR. SO WHEN A DIFFERENT KIND OF THING COMES ALONG, THEY GO BACK TO WHAT THEY KNOW AND UNDERSTAND, AND THEY CAN SIMPLY CALCULATE. THEY DON'T WANT TO INTRODUCE PRECISION BECAUSE MAYBE THEY DON'T HAVE A COMPUTER PROGRAM THAT'S CAPABLE OF TAKING IN 30 DIFFERENT INTEREST RATES. AND EVEN IF THEY DID, MAYBE THEIR CLIENT WOULD PUT UP, YOU KNOW, A FUSS ABOUT PAYING FOR THOSE CALCULATIONS. SO THINGS – PEOPLE DO WHAT'S SIMPLE AND THEY DO WHAT'S CONVENIENT.

THE ARBITRATOR: ISN'T IT TRUE THAT ONE OF THE REASONS THE LEGISLATURE TALKED IN TERMS OF REASONABLENESS IS BECAUSE OF THE FACT THAT THEY WANTED TO MAKE THE INDIVIDUAL BENEFICIARIES WHO WERE GETTING THEIR BENEFITS FROM THIS FUND, KNOWING THAT [p. 219] SOMETIME WHEN THEY RETIRE, OR WHAT HAVE YOU, THEY'LL BE GETTING SOME MONEY OUT OF THE FUND AND NOT RUN INTO A STUDEBAKER SITUATION AND THINGS OF THAT SORT?

SO WHEN THEY TALK ABOUT BEING CONSERVATIVE, THEY DIDN'T WANT THE FUNDS TO BE OVERLY SPECULATIVE IN REGARD TO GETTING

HIGH INTEREST RATES WITH THE PROPOSITION THEY MIGHT LOSE IT ALL. IN OTHER WORDS, THEY DIDN'T WANT A SITUATION LIKE WE HAD IN OCTOBER, WHEN YOU DROPPED 500 POINTS AND WIPED OUT SOME TRUST FUNDS. THAT'S WHY THEY WANTED THEM TO DIVERSIFY, THAT SORT OF THING. ISN'T THAT ONE OF THE REASONS THAT YOU HAVE TO LOOK AT THE INTEREST RATES ON WHAT YOU CALL A CONSERVATIVE BASIS, AND THEN THE ONLY QUESTION IS, IS WHAT IS CONSERVATIVE AND WHAT IS REASONABLE? THAT'S THE REASON I GUESS WE'RE HERE. BUT I CERTAINLY HAVE ALWAYS UNDERSTOOD THAT GOING FOR THE HIGHEST INTEREST RATE IS NOT THE JOB OF THE TRUSTEES, NOR WOULD IT BE YOUR JOB AS AN ACTUARY TO SAY THE ONLY RATE YOU CAN GET IS THE HIGHEST RATE, AND THAT'S THE ONLY THING YOU CAN INVEST IN. I'M SURE YOU WOULDN'T DO THAT, WOULD YOU?

THE WITNESS: I AGREE WITH YOU THAT IT'S NOT ALWAYS PROPER TO GO FOR THE HIGHEST RATE, WHICH WOULD BE SOMETHING SPECULATIVE LIKE EQUITIES. BUT AT THIS POINT IN TIME IN THE MARKETPLACE THERE WERE PERFECTLY, 100 PERCENT SAFE SECURITIES, U.S. – THIS [p. 220] IS ALL THIS IS BASED ON IS THE SAFEST POSSIBLE SECURITIES. I MEAN, THAT'S WHY I'M SAYING YOU COULD MAYBE EVEN HAVE LOWER WITHDRAWAL LIABILITIES BECAUSE YOU COULD – THEORETICALLY, EVERY ECONOMIST YOU TALK TO WOULD SAY YOU SHOULD EVEN BE ABLE TO EARN MORE IF YOU TAKE RISK.

I AGREE WITH YOU, OR AGREE TO THE EXTENT THAT I DIDN'T WANT TO HAVE TO DEFEND THAT KIND OF PRACTICE HERE TODAY. THAT'S WHY I CHOSE THE BUCK FORWARD INTEREST RATES, WHICH IS BASED ON RISK-FREE SECURITIES. AND THE IDEA IS THAT THERE'S REALLY – I'M OVERSIMPLIFYING HERE, BUT THERE'S NO REINVESTMENT RISK IN THIS TYPE OF CALCULATION. IN THE ONGOING VALUATION, THEY'RE GOING TO BE PUTTING IN NEW MONEY NEXT YEAR.

THE ARBITRATOR: I HAVE ONLY ONE MORE QUESTION, AND THEN I'LL GET OUT OF THIS PICTURE ENTIRELY.

THIS BUCK FORWARD INTEREST RATE INDEX THAT YOU'VE GOT HERE, DO YOU KNOW OF ANY MULTI-EMPLOYER PLAN THAT USES THIS THEORY OR DOCTRINE?

THE WITNESS: I COULDN'T TELL YOU THE NAME. I – YOU MEAN, IN THEIR ACTUAL WITHDRAWAL LIABILITY CALCULATIONS?

THE ARBITRATOR: YES.

THE WITNESS: NO, I DON'T THINK THERE ARE ANY.

THE ARBITRATOR: GO AHEAD.

[p. 221] Q BY MR. BEERS: WHAT RATE –

DO YOU WANT ME TO CONTINUE THE CROSS?

MR. NELSON: GO AHEAD.

Q BY MR. BEERS: WHAT RATE DID YOU USE AGAIN IN CALCULATING THE FIRST TWO EXHIBITS, 15-A AND -B?

A 15-A AND -B?

Q WHAT RATE WOULD BE USED?

MR. NELSON: THE PROPER TERM WOULD BE RATES THE SAME AS RATES WHEN TALKING ABOUT THE P.B.G.C.

Q BY MR. BEERS: 16-A AND -B. WHAT RATES DID YOU USE TO DISCOUNT THOSE TO DETERMINE THE WITHDRAWAL LIABILITY IN THOSE TWO EXHIBITS, -A AND -B?

A WE USED ESSENTIALLY THE FORWARD RATES –

Q SPECIFICALLY, WHAT'S THE NUMBER THAT YOU PLUGGED IN?

A WELL, WE USED – ON THE LEFT HALF OF THE PAGE YOU SEE THE EQUIVALENT RATES?

Q YOU'RE TALKING ABOUT EXHIBIT 15 NOW.

A I'M SORRY, YES. BUT YOUR QESTION WAS ON EXHIBIT 16.

Q CORRECT.

A I'M BASING MY ANSWER ON EXHIBIT 15.

Q YOU USE THE VALUE WHERE?

A ON THE LEFT-HAND SIDE OF THE PAGE THERE ARE THREE COLUMNS ENTITLED "EQUIVALENT RATES." AND THOSE ESSENTIALLY ARE, FOR

EASE OF DISCUSSION WE CAN SAY [p. 222] ARE ONE SINGLE RATE OVER ALL TIME THAT ARE EQUIVALENT TO THE FORWARD RATES ON THE RIGHT-HAND SIDE OF THE PAGE. SO FOR EASE OF DISCUSSION, I THINK AS WHEN WE DID CALCULATIONS AS OF 12-31-79, WE ACTUALLY USED THE 1-1-80 RATES OF 10.4 AND 10.7.

Q 10.4 AND 10.7?

A AND 10.2. YOU MIGHT FEEL THAT THAT'S WRONG AND WE SHOULD HAVE USED THE 12-1-79. POINT IN FACT, WHAT WE DID WAS MORE CONSERVATIVE, I.E., A HIGHER WITHDRAWAL LIABILITY, AND WE – THE 1-1-80 WAS A POINT IN TIME AND THAT WAS ESSENTIALLY THE CLOSEST IN TIME TO 12-31-79. SO WE WERE ONE DAY REMOVED. AND I'M SURE THAT THE INTEREST RATES DID NOT CHANGE VERY SIGNIFICANTLY OVER THAT ONE DAY.

Q DO YOU KNOW IF ANY TRUST FUND ANYWHERE, ANY MULTI-EMPLOYER PENSION TRUST FUND THAT USES OVER A TEN PERCENT RATE IN DISCOUNTING THE UNFUNDED VESTED LIABILITY?

A I'M REALLY NOT FAMILIAR WITH – NO, I'M NOT.

Q YOU DON'T KNOW?

A NO.

Q ANOTHER POINT THAT BOTHERS ME. YOU'RE TALKING ABOUT HOW IF YOU HAVE IN HAND THIS WITHDRAWAL LIABILITY PAYMENT, IT DOESN'T MAKE ANY DIFFERENCE THAT YOU'RE TALKING ABOUT FUTURE MONIES. WHAT ABOUT [p.

223] WITHDRAWAL LIABILITY PAYMENTS PAID IN INSTALLMENTS? DOESN'T THAT TAKE THAT ARGUMENT AWAY? YOU ARE TALKING ABOUT INVESTING MONEY THAT'S NOT IN HAND AT THAT TIME; IS THAT CORRECT?

MR. NELSON: THAT DEFINITELY IS TWO QUESTIONS.

THE ARBITRATOR: WHY DON'T YOU BREAK IT DOWN.

MR. BEERS: I'LL BREAK IT DOWN INTO TWO. IN FACT I'LL ASK THE ONE QUESTION.

Q WHEN A WITHDRAWING EMPLOYER DECIDES TO PAY THE WITHDRAWAL LIABILITY USING PAYMENTS OVER A PERIOD OF YEARS, THE MONEY IS NOT IN HAND AT THE TIME OF THE WITHDRAWAL; IS THAT CORRECT?

A CORRECT.

Q YOU CAN'T GO OUT AND LOCK IN SOME INTEREST-BEARING INVESTMENT WITH MONEY YOU DON'T HAVE ON HAND; IS THAT CORRECT?

A RIGHT.

MR. BEERS: NO FURTHER QUESTIONS.

THE ARBITRATOR: MR. NELSON?

REDIRECT EXAMINATION

BY MR. NELSON:

Q MR. KING, THE ASSUMPTIONS THAT ARE BEING USED IN MAKING THE CALCULATIONS

WHICH RESULTED IN EXHIBITS 16-A THROUGH -D ARE BASIC ACTUARIAL ASSUMPTIONS, AREN'T THEY?

[p. 224] A WOULD YOU REPEAT THE QUESTION?

Q I PROBABLY SHOULD.

IN PERFORMING THE ANALYSIS AND DOING THE CALCULATIONS THAT RESULTED IN EXHIBITS 16-A THROUGH -D, DID YOU USE ACTUARIAL ASSUMPTIONS WHICH WOULD BE COMMONLY USED THROUGHOUT THE ACTUARIAL SCIENCES?

A YES.

Q WOULD THOSE ASSUMPTIONS CHANGE DEPENDING UPON THE NUMBER OF EMPLOYERS WHO HAPPENED TO BE PARTICIPATING IN THE PENSION PLAN?

A NO.

Q IN OTHER WORDS, DOES IT MAKE A DIFFERENCE WHETHER THERE'S TEN EMPLOYERS OR ONE EMPLOYER?

A NO. I WOULDN'T THINK SO.

Q WITH RESPECT TO YOUR CURRENT EMPLOYER - MR. BATES MAY HAVE ALREADY ANSWERED THAT.

DOES BUCK CONSULTANTS CURRENTLY REPRESENT ANY MULTI-EMPLOYER TRUST FUNDS?

A I THINK WE REPRESENT A COUPLE.

Q DO YOU REPRESENT ANY IN CALIFORNIA?

A NOT TO MY KNOWLEDGE.

MR. NELSON: I HAVE NO FURTHER QUESTIONS.

MR. BEERS: I NOW HAVE SOME QUESTIONS ON EXHIBIT 16.

[p. 225] RECROSS-EXAMINATION

BY MR. BEERS:

Q LET ME CLARIFY THAT TO MAKE SURE WE HEARD THAT RIGHT.

YOU SAID THAT THE RATES YOU USED TO CALCULATE THE WITHDRAWAL LIABILITY IN EXHIBIT 16 WERE THE RATES IN '79; IS THAT CORRECT?

A WELL, WE DID BOTH AS OF 12-31-79 AND AS OF 12-31-80 TO COME UP WITH TWO DIFFERENT POOLS.

Q SO THE RATES YOU USED SPECIFICALLY WERE WHICH ONES? THE 12-1-79 RATE?

A THE 1-1-80 AND 1-1-81.

Q THE 1-1-80 AND THE 1-1-81 ARE THE TWO RATES YOU USED?

A YOU MIGHT NOTE THAT THOSE ARE CONSERVATIVE COMPARED TO WHAT HIGHER WITHDRAWAL LIABILITIES THAN THE 12-80 AND THE 12-79.

Q YOU WERE SAYING THAT YOU USED STANDARD ACTUARIAL ASSUMPTIONS IN COMING UP

WITH YOUR CONCLUSIONS AS TO YOUR WITHDRAWAL LIABILITY IN EXHIBIT 16-A, -B, -C AND -D. WHAT WERE THOSE STANDARD ACTUARIAL ASSUMPTIONS?

A I THINK SOME OF THE ASSUMPTIONS, THE DEMOGRAPHIC ASSUMPTIONS SEGAL WAS MAKING.

Q YOU USED THE SAME MORTALITY TABLE?

A YES.

[p. 226] Q YOU USED THE SAME ASSUMPTIONS REGARDING UNRECORDED CREDIT?

A YES. EVEN THOUGH I WASN'T QUITE CONVINCED THAT THAT WAS REASONABLE.

Q DID YOU HAVE ACCESS TO ANY INFORMATION IN ADDITION TO WHAT'S IN THE REPORTS THAT ARE EXHIBITS -C AND -D, 7-C AND -D? FOR EXAMPLE, DID YOU HAVE ACCESS TO CENSUS DATA FOR ALL THE MEMBERS OF THE FUND?

A NO.

Q DID YOU CALCULATE ANY VALUES PER PARTICULAR PARTICIPANT?

A NO, WE TRIED – WE ASKED FOR THE CASH FLOWS THAT WERE PROJECTED BY SEGAL. THEN WE COULD HAVE DONE A VERY, VERY PRECISE CALCULATION WITH OUR FORWARD INTEREST RATES, BUT THEY WERE NOT AVAILABLE.

MR. NELSON: WE HAD A LITTLE DISCUSSION YESTERDAY ABOUT TRYING TO FIGURE OUT

WHAT THE CASH FLOWS WERE IN DISCOVERY, AND WE WERE HAVING A LITTLE DIFFICULTY IN COMMUNICATING WHAT WE WERE TALKING ABOUT. I THINK WE JUST DISCOVERED WHAT WE WERE COMMUNICATING ABOUT.

(BRIEF PAUSE.)

MR. BEERS: I HAVE JUST TWO OTHER QUESTIONS.

Q NUMBER ONE, DID YOU ACCOUNT FOR THE EXPENSE OF RUNNING THE FUND IN CHOOSING THE INTEREST RATES YOU WERE USING TO CALCULATE WITHDRAWAL LIABILITY?

[p. 227] A NO. I THOUGHT ABOUT THAT AND I CAME TO THE CONCLUSION THAT THE EXPENSES OF THE FUND WERE GOING TO BE THE SAME WHETHER THIS EMPLOYER WITHDREW OR NOT, SO THAT I DID NOT TAKE THAT INTO ACCOUNT.

Q ANOTHER THING, DO YOU KNOW WHAT KIND OF MORTALITY TABLE P.B.G.C. USES IN CALCULATING THEIR RATES THAT THEY PUBLISH, RESULTING FROM THEIR SURVEY?

MR. NELSON: COULD WE GET SOME FOUNDATION AS TO WHEN?

Q BY MR. BEERS: LET'S SEE, LET'S MAKE IT DURING 1980 AND '81.

A I HAVE A ROUGH IDEA OF IT. I HAVEN'T LOOKED AT IT IN QUITE AWHILE.

Q HOW DO THOSE MORTALITY TABLES COMPARE TO INSURANCE COMPANY MORTALITY TABLES?

A I REALLY DON'T KNOW.

Q YOU DON'T KNOW WHETHER THEY'RE MORE OR LESS CONSERVATIVE?

A NO, I DON'T.

Q WOULD THAT HAVE AN EFFECT ON THE REASONABLENESS OF THE RATES –

A I DON'T THINK THEY WERE USED IN THE –

Q LET ME JUT FINISH THE QUESTION SO IT'S ALL ON THE RECORD.

WOULD THE MORTALITY TABLE USED HAVE AN [p. 228] EFFECT UPON THE RATES THAT THE P.B.G.C. ENDS UP PUBLISHING TO SHOW THE PURCHASE VALUE OF ANNUITIES?

A WOULD YOU JUST REPEAT THAT?

Q WOULD THE MORTALITY TABLE USED HAVE AN EFFECT ON THE INTEREST RATES PUBLISHED BY THE P.B.G.C. BASED UPON THEIR SURVEY OF THE INSURANCE COMPANIES?

A NO.

Q A MORE CONSERVATIVE OR LESS CONSERVATIVE MORTALITY TABLE WOULDN'T AFFECT THE NUMBERS AT ALL; IS THAT WHAT YOU'RE SAYING?

MR. NELSON: LET ME INTERPOSE ONE MINOR OBJECTION, WHICH IS KIND OF CONVOLUTED, BUT HE'S NOT THE P.B.G.C. WHETHER THAT

PARTICULAR GOVERNMENT AGENCY WOULD TAKE THE MORTALITY AND THEIR ACTUARIES WOULD TAKE THAT MORTALITY TABLE INTO ACCOUNT IN SETTING THEIR RATES IS A QUESTION I THINK YOU'D HAVE TO ASK THE P.B.G.C.

MR. BEERS: THAT'S A GOOD POINT. LET ME ASK IT IN THE ABSTRACT.

Q DOES THE MORTALITY TABLE YOU USE AFFECT YOUR DETERMINATION – FOR EXAMPLE, IN VALUING THE FUNDING ASSUMPTIONS – IN VALUING THE TRUST TO COME UP WITH A NET INVESTMENT RETURN, DOES CHANGING YOUR MORTALITY TABLE HAVE AN EFFECT ON THE RATE YOU END UP WITH IF YOU USE A DIFFERENT MORTALITY TABLE KEEPING ALL THE [p. 229] ASSUMPTIONS THE SAME, DO YOU END UP WITH A DIFFERENT NET ASSUMPTION RATE?

A THE QUESTION IS TOTALITY AND OF COURSE NOT. YOU ASSUME THAT YOU CHANGE NO OTHER ASSUMPTION, AND THEN YOU ASK IF YOU CHANGE JUST THE MORTALITY, WILL THAT CHANGE THE INVESTMENT. OF COURSE NOT, BY DEFINITION.

Q MORE PRECISELY, I GUESS WHAT I WANT TO DO IS THE WITHDRAWING LIABILITY, NOT THE –

A OF COURSE.

Q THE WITHDRAWAL LIABILITY, IF YOU CHANGE THE MORTALITY TABLE, IS IT CORRECT YOU END UP CHANGING THE DISCOUNT RATE FOR

THE UNFUNDED VESTED LIABILITY, ASSUMING ALL OTHER ASSUMPTIONS STAY THE SAME?

A THE QUESTION IS MEANINGLESS.

Q THE ANSWER IS IT DOES CHANGE IT?

THE ARBITRATOR: THAT ISN'T WHAT HE SAID.

MR. NELSON: WITHOUT PUTTING WORDS IN HIS MOUTH, I DON'T KNOW THAT YOU TWO ARE SPEAKING THE SAME LANGUAGE.

MR. BEERS: WE MIGHT NOT BE, SO I'LL SKIP THAT QUESTION FOR NOW.

THAT'S ALL THE QUESTIONS I HAVE.

MR. NELSON: JUST ONE.

THE ARBITRATOR: GO AHEAD.

[p. 230] FURTHER REDIRECT EXAMINATION

BY MR. NELSON:

Q DOES THE FACT THAT THE WITHDRAWAL LIABILITY PAYMENTS ARE PAID IN INSTALLMENTS HAVE AN IMPACT UPON THE REASONABLENESS OF THE ASSUMPTION USED?

A WELL, I THINK –

Q I GUESS THE INTEREST ASSUMPTION USED.

A TO ME, THE PROPER WAY, AND THAT GETS BACK TO THE QUESTION OF COUNSEL EARLIER, THAT THE FACT THAT YOU DON'T HAVE ALL OF

THE ASSETS ON HAND IF THE WITHDRAWING EMPLOYER IS GOING TO PAY IN INSTALLMENTS, DOESN'T MEAN THAT SIX PERCENT IS THE RIGHT INTEREST RATE TO USE. I THINK THE CORRECT WAY TO HANDLE THAT SITUATION IS TO USE A REASONABLE INTEREST RATE IN CALCULATING THE WITHDRAWAL LIABILITY AND USE A REASONABLE INTEREST RATE IN CALCULATING THE PAYMENTS.

WHAT IS BEING DONE HERE IS AN UNREASONABLE RATE, COMPOUNDED WITH ANOTHER UNREASONABLE RATE, AND HOPING FOR A REASONABLE RESULT. BUT TO ME, THE PROPER, THEORETICAL APPROACH IS TO CALCULATE ON THE SINGLE SUM, ON REASONABLE ASSUMPTIONS AND THEN CALCULATE THE WITHDRAWAL LIABILITIES OR PAYMENTS ON REASONABLE ASSUMPTIONS. I RECOGNIZE THAT'S NOT STATUTE. STATUES [SIC] SAYS USE THE FUNDING ASSUMPTION. I THINK THE POINT IS TO CALCULATE IT USING A WITHDRAWAL [p. 231] LIABILITY REASONABLY FIRST. YOU HAVE TO DO THAT TO GET THAT AFTER IT.

Q LET ME JUST, AS A POINT OF CLARIFICATION, MAYBE FOR THE COURT REPORTER'S BENEFIT. YOU WERE SAYING ON REASONABLE ASSUMPTIONS AS OPPOSED TO UNREASONABLE ASSUMPTIONS?

A YES.

Q I WAS HAVING TROUBLE HEARING IT OVER HERE.

FURTHER RECROSS EXAMINATION

BY MR. BEERS:

Q ONE LAST QUESTION. CAN THERE BE MORE THAN ONE BEST ESTIMATE OF THE UNFUNDED VESTED LIABILITY FOR A PARTICULAR PENSION FUND UNDER MEPA [SIC]?

MR. NELSON: I THINK THAT CALLS FOR A LEGAL CONCLUSION.

MR. BEERS: HE TESTIFIED HE'S GOT AN UNDERSTANDING OF WHAT REASONABLE MEANS UNDER THE ACT, AND HE'S TESTIFYING USING TERMS FROM THE ACT, TERMS OF ART FROM THE ACT. I THINK THAT'S WITHIN HIS AREA OF EXPERTISE AND NECESSARY TO SEE WHAT HIS CONCLUSION IS THERE. HE CAN DEFINE THE TERM IF HE HAS HIS OWN MEANING AS TO WHAT BEST ESTIMATE IS.

MR. NELSON: I GUESS I'M MORE CONCERNED WITHOUT INTRUDING TOO FAR WITH COULD ANYONE ACTUALLY HAVE MORE THAN ONE BEST ESTIMATE AS TO WHAT A [p. 232] REASONABLE –

MR. BEERS: LET ME RESTATE THE QUESTION.

Q CAN TWO DIFFERENT ACTUARIES HAVE DIFFERENT BEST ESTIMATES OF THE UNFUNDED VESTED LIABILITY OF THE SAME PLAN?

A YES.

MR. BEERS: THANK YOU. THAT'S IT.

THE ARBITRATOR: NOTHING MORE?

LET'S SEE WHETHER I UNDERSTAND SOMETHING MYSELF. IN COMING TO YOUR CONCLUSIONS IN REGARD TO THE INTEREST ASSUMPTIONS BEING REASONABLE OR UNREASONABLE, WHEN YOU COME TO AN INTERESTING ASSUMPTION, DON'T YOU TAKE MORTALITY TABLES AS A FACTOR TO BE CONSIDERED IN COMING TO THAT CONCLUSION?

THE WITNESS: IF – IF I CHANGE THE INTEREST RATE, THAT DOESN'T MEAN I AUTOMATICALLY CHANGE – IF I CHANGE A MORTALITY TABLE, IT DOESN'T MEAN I AUTOMATICALLY CHANGE AN INTEREST RATE. THERE'S NO CONNECTION, THERE'S A COUPLE LEVERS MOVE AND YOU HIT SOMETHING AND THE INTEREST RATE CHANGES.

BUT I THINK WHAT YOU'RE GETTING AT IS IF THE MORTALITY ASSUMPTION IS WRONG, CAN YOU MAKE UP FOR THAT WITH A CORRESPONDING, AN OFFSETTING ERROR IN THE INTEREST RATE, YES.

THE ARBITRATOR: I JUST MEANT THAT IN COMING TO [p. 233] THE INTEREST RATE ASSUMPTION, I THOUGHT THERE WAS CERTAIN FACTORS THAT ACTUARIES TAKE INTO CONSIDERATION.

MR. BEERS: IF I COULD INTERRUPT FOR JUST A MOMENT I THINK I KNOW WHERE I WAS GOING WRONG WITH MY QUESTIONS NOW. I WAS PHRASING IT, AND MAYBE YOU'RE TRYING TO GET TO THE SAME PLACE I WAS.

WHEN YOU'RE TALKING ABOUT JUST THE LIABILITY SIDE –

THE WITNESS: UH-HUH.

MR. BEERS: – YOU'RE TALKING ABOUT PREDICTING WHAT THE FUTURE LIABILITIES ARE, AND YOU'RE NOT TALKING ABOUT THE INVESTMENT RETURN. WHEN YOU CHANGE THE MORTALITY TABLES, THAT DOES HAVE AN EFFECT ON THE VESTED LIABILITY IN THE FUTURE; IS THAT CORRECT?

THE WITNESS: THAT'S CORRECT.

THE ARBITRATOR: THAT'S WHAT I WAS TRYING TO GET AT.

THE WITNESS: ABSOLUTELY. IT DOESN'T HAVE AN AFFECT ON THE INTEREST RATE.

THE ARBITRATOR: THAT'S WHERE I WAS HAVING A PROBLEM.

ANYTHING ELSE?

MR. NELSON: NO.

THE ARBITRATOR: THANK YOU VERY MUCH, MR. KING.

THE WITNESS: IT WAS A PLEASURE.

[p. 234] THE ARBITRATOR: YOU'RE EXCUSED.

MR. NELSON, DO YOU HAVE ANY OTHER WITNESSES?

MR. NELSON: NO, I DO NOT.

THE ARBITRATOR: MR. BEERS.

MR. BEERS: THE TRUST WOULD LIKE TO CALL MR. BATES TO THE STAND.

MAREL K. BATES,

CALLED AS A WITNESS BY THE FUND, HAVING BEEN PREVIOUSLY DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE ARBITRATOR: LET THE RECORD SHOW THAT THIS WITNESS HAS BEEN PREVIOUSLY SWORN.

DIRECT EXAMINATION

BY. MR. BEERS:

Q MR. BATES, I WANT TO REFER TO THE TRUST EXHIBIT NUMBER 5. I'LL HAND YOU A COPY OF IT. THAT'S YOUR RESUME. WHAT IS YOUR EDUCATIONAL BACKGROUND?

A I RECEIVED MY BACHELORS IN MATHEMATICS IN JANUARY 1966 AT THE UNIVERSITY OF CALIFORNIA, BERKELEY. I RECEIVED A MASTERS IN MATHEMATICS AT U.C.L.A. IN JUNE OF 1967. AND I STUDIED FURTHER AT [p. 235] U.C.L.A. THROUGH THE COURSE AND PH.D. QUALIFYING EXAMINATION, BUT I DID NOT COMPLETE MY DOCTORATE AT U.C.L.A. THEN MY FURTHER EDUCATION IN ACTUARIAL SCIENCE AT NORTHEASTERN UNIVERSITY

AND LEAVES OF ABSENCE IN '76, '77 AND '79. AND I'VE HAD SEMINARS IN ECONOMICS SINCE THEN.

Q WHAT HAS BEEN YOUR EXPERIENCE AS AN ACTUARY?

MR. NELSON: I'LL STIPULATE HE'S AN EXPERIENCED ACTUARY.

MR. BEERS: THAT'S FINE. IT WILL ONLY TAKE A COUPLE OF MINUTES. IT WILL ONLY TAKE A COUPLE OF MINUTES TO GO THROUGH HIS RESUME.

THE WITNESS: I'VE ONLY BEEN WITH ONE COMPANY, MARTIN SEGAL COMPANY, SINCE 1971.

Q BY MR. BEERS: WHAT POSITIONS HAVE YOU HELD WITH THE MARTIN SEGAL COMPANY?

A BEGINNING AS AN ACTUARIAL CLERK, AND IN 1984 I WAS MADE CHAIRMAN OF THE DEPARTMENT AND THE VICE-PRESIDENT OF THE COMPANY.

Q WHAT IS YOUR CURRENT POSITION, VICE-PRESIDENT?

A VICE-PRESIDENT AND ACTUARY IS MY TITLE.

Q YOU'RE LOCATED IN THE LOS ANGELES OFFICE?

A YES.

Q YOU'RE AN ENROLLED ACTUARY; IS THAT [p. 236] CORRECT?

A YES.

MR. NELSON: THEY BOTH ARE.

Q BY MR. BEERS: YOU'VE BEEN IN THE ROOM WHILE MR. KING HAS TESTIFIED ABOUT HIS METHOD FOR CALCULATING WITHDRAWAL LIABILITY?

A YES.

Q DO YOU HAVE RESERVATIONS AS TO THE REASONABLENESS OF THE METHODS HE USED IN CALCULATING WITHDRAWAL LIABILITY?

A YES.

Q COULD YOU LIST SOME OF THOSE FOR US?

A WELL, MORE OR LESS, IN ORDER, HE STATES THAT THE P.B.G.C. RATES ARE TOO CONSERVATIVE, AS I UNDERSTOOD IT, BY ONE HUNDRED BASIS POINTS ON THE INTEREST ASSUMPTION FROM COMPETITIVE ANNUITY PURCHASE RATES.

MR. NELSON: WITHOUT INTERRUPTING THE FLOW OF THE QUESTION TOO MUCH, WE'RE JUST GIVING HIS BASIS FOR THE RESERVATION, SO I DON'T NEED TO OBJECT TO THE CHARACTERIZATION OF THE TESTIMONY.

MR. BEERS: NO, YOU DON'T NEED TO. THE RECORD WILL SPEAK FOR ITSELF AS TO WHAT MR. KING SAID.

THE WITNESS: I HAVE NO KNOWLEDGE THAT THE RATES ARE THAT DIFFERENT. I HADN'T HEARD THAT THEY WERE THAT DIFFERENT, BUT THERE'S A REASON FOR THEM TO BE [p. 237] SOMEWHAT DIFFERENT, AND THAT IS, THAT THE P.B.G.C.

RATES ARE APPLIED TOGETHER WITH THEIR OWN MORTALITY TABLE, KNOWN AS THE UP, U.P. '84 TABLE, WHICH STANDS FOR UNISEX PENSIONER '84 MORTALITY TABLE.

WHEREAS INSURANCE COMPANIES USUALLY USE THEIR OWN MORTALITY TABLES, AND THE INSURANCE COMPANY MORTALITY TABLES, IN MY EXPERIENCE, ARE MORE CONSERVATIVE THAN THE UP '84 TABLE. SO IT IS POSSIBLE FOR THE P.B.G.C. AND AN INSURANCE COMPANY TO COME TO THE SAME LIABILITY WITH THE P.B.G.C. USING A LOWER INTEREST RATE, BECAUSE WHAT THEY TAKE WITH THE LOWER INTEREST RATE THEY GIVE WITH THE LESS CONSERVATIVE MORTALITY TABLE.

I SAY THAT IS POSSIBLE. MY SENSE IS THAT THEY DON'T GIVE AND TAKE EQUALLY, AND THAT THE P.B.G.C. RATES ARE A LITTLE BIT CONSERVATIVE. I WOULD BE SURPRISED IF THEY WERE AS CONSERVATIVE AS A HUNDRED BASIS POINTS.

WITH RESPECT IN THAT CONTEXT THE REMARK ABOUT AN OFFICER AT TRANSAMERICA – OCCIDENTAL –

MR. NELSON: WAIT, WAIT, WAIT. THE QUESTION WAS WHETHER OR NOT YOU HAD RESERVATIONS ABOUT – I DON'T WANT TO MISCHARACTERIZE THE QUESTION, BUT I THINK THE QUESTION WAS ABOUT –

MR. BEERS: LET'S GO AHEAD AND STICK TO THE MOMENT. WE'LL COME BACK TO THE – ACTUALLY THAT DOES [p. 238] APPLY TO WHAT HE'S

TALKING ABOUT. HE'S TALKING ABOUT THE P.B.G.C. RATES, AND IF I REMEMBER RIGHT, THE CONVERSATION HE'S REFERRING TO AS RECITED BY MR. KING IS ONE WHERE P.B.G.C. CALLED UP HIS OFFICES AND SOMEONE IN THE OFFICE ASKED HIM FOR A QUOTE. SO I THINK THAT'S CONTINUING ON HIS POINT THAT THE P.B.G.C. RATES, HE DISAGREES WITH MR. KING'S ANALYSIS OF THE P.B.G.C. RATES.

MR. NELSON: WITHOUT CONCEDING YOUR CHARACTERIZATION OF THE TESTIMONY, I THINK THE QUESTION YOU ASKED HIM WAS WHAT RESERVATIONS DID HE HAVE, AND NOW WHAT WE'RE GETTING IS ALL THE BACKGROUND. AND IT REALLY IS SORT OF TURNING INTO A POINT BY POINT WHO SAID WHAT AND –

MR. BEERS: LET ME ASK THE QUESTION, AND THAT'LL TAKE CARE OF IT.

MR. NELSON: IT WOULD BE EASIER.

Q BY MR. BEERS: YOU'VE STATED THAT YOU HAVE RESERVATIONS ABOUT MR. KING'S CHARACTERIZATION OF P.B.G.C. RATES AS BEING UNREASONABLE. DO YOU THINK – WHAT DO YOU THINK AS FAR AS VALUE IN AN ACTUARY'S DECISION-MAKING PROCESS OF MR. KING'S CONVERSATIONS HE RELATES REGARDING CALCULATION OF A RATE FOR THE P.B.G.C. BACK IN '75, I BELIEVE IT WAS?

A I DON'T THINK HE MENTIONED THE YEAR, AND I DON'T THINK HE MENTIONED THE P.B.G.C. ASKING HIM. I [p. 239] THINK HE MENTIONED AN OFFICER OF HIS COMPANY ASKING HIM FOR A RATE

AND HIM CITING A RATE THAT WAS NOT REASONABLE, AND THE OFFICER OF THE COMPANY NOT BEING TERRIBLY CONCERNED.

MY ONLY REMARK WAS THAT – THAT THE IMPLICATION SEEMED TO BE THAT THE RESPONSES TO THE P.B.G.C. MIGHT BE OF THAT SAME ORDER. AND IT SEEMED TO ME THAT SINCE P.B.G.C. HAS WAYS OF FINDING OUT WHAT RATES ARE IN FACT BEING APPLIED, SINCE THEY SUPERVISE VIRTUALLY ALL PLAN TERMINATIONS AND ANNUITY PURCHASES, THAT IT WOULDN'T BE SUCH A GOOD IDEA, IT WOULD SEEM TO ME, TO BE SO CAVALIER IN QUOTING A RATE TO P.B.G.C. THAT WOULD NOT BE ONE THAT YOU REALLY EXPECTED TO SELL BUSINESS AT.

Q WHAT IS ANOTHER RESERVATION THAT YOU HAVE ABOUT THE METHOD USED TO CALCULATE WITHDRAWAL LIABILITY BY MR. KING?

A THE PRIMARY ONE REALLY, IT GOES BACK TO THIS ISSUE OF ASSETS ON HAND VERSUS CONTRIBUTIONS TO COME IN IN THE FUTURE. THE BUCK FORWARD INTEREST RATE CALCULATION, AS I UNDERSTAND IT, HAS TO DO WITH WHAT HIS INTEREST RATES ARE APPLIED FOR MONIES ON HAND. AND THE SITUATION WITH THE WITHDRAWAL LIABILITY IS THAT PAYMENTS ARE NOT ON HAND TYPICALLY FROM THE WITHDRAWING EMPLOYER, AND USUALLY THERE ISN'T AN OFFER TO PAY THEM IN A LUMP SUM.

[p. 240] TO THE EXTENT THAT IF AN EMPLOYER SAID, I WILL PAY THE AMOUNT DUE IN A LUMP

SUM, PAYABLE ON OR ABOUT THE DAY THE FIRST PERIODIC PAYMENT WOULD BE DUE, THEN THERE WOULD BE LITTLE DISTINCTION. BUT THAT IS NOT, IN FACT, HOW IT NORMALLY WORKS. AND IN FACT, THE STATUTE PROVIDES FOR CHARGING THE EMPLOYER INTEREST AT VALUATION INTEREST RATE DURING THE PERIOD OF PAYMENTS.

SO WHAT IT AMOUNTS TO IS, THE – THE FUND HAS LOANED, IN A SENSE, THE FUNDS TO THE EMPLOYER AT A SIX PERCENT INTEREST RATE, AND THEN WILL BE RECEIVING THOSE FUNDS IN THE FUTURE. IN THIS CASE, I BELIEVE IT WAS OVER AN 11-YEAR PERIOD UNDER THE DEMAND LETTER, AND SOMETIMES THAT PERIOD DOESN'T START RIGHT AWAY EITHER. SO YOU'RE TALKING ABOUT ASSETS TO BE RECEIVED QUITE A BIT INTO THE FUTURE.

SO – AND YOU COMBINE THAT WITH THE FACT THAT THIS PERIOD, 1981, THE PERIOD OF THE WITHDRAWAL LIABILITY CALCULATIONS, JANUARY 1, 1981, YOU'RE TALKING ABOUT AN ABNORMALLY HISTORICAL PERIOD. YOU'RE TALKING ABOUT A PERIOD WHERE INTEREST RATES WERE VERY, VERY HIGH. AND THOSE INTEREST RATES ARE A FUNCTION OF THE SUPPLY AND DEMAND FOR CREDIT. AND BECAUSE OF THE ACTIONS OF THE FEDERAL RESERVE, THE SUPPLY OF CREDIT HAD BEEN CONSIDERABLY RESTRICTED AND INTEREST RATES HAD BEEN DRIVEN VERY HIGH. SO THERE'S [p. 241] VERY GOOD REASON TO THINK THAT THEN CURRENT RATES COULD NOT BE ACHIEVED ON MONIES TO BE RECEIVED FIVE OR TEN YEARS LATER.

Q AND IN FACT, INTEREST RATES NOW ARE SIMPLY LOWER; IS THAT CORRECT?

A THAT'S CORRECT. I MEAN, WHEN WE DID OUR CALCULATIONS OF WITHDRAWAL LIABILITY, WE FELT THAT WE KNEW THAT INTEREST RATES WOULD COME DOWN. WE DIDN'T KNOW WHEN OR HOW FAR, OF COURSE NOBODY REALLY DOES, BUT WE FELT THAT INTEREST RATES WOULD COME DOWN BECAUSE THEY WERE, YOU KNOW, A TEMPORARY SITUATION CAUSED BY THE ACTIONS OF THE FEDERAL GOVERNMENT.

LET ME SAY, THEN –

MR. NELSON: IS THERE A QUESTION PENDING?

Q BY MR. BEERS: THE QUESTION PENDING IS HE HAS A LIST IN HIS MIND OF PROBLEMS THAT HE HAD WITH MR. KING'S METHOD OF VALUING THE WITHDRAWAL LIABILITY FOR CONCRETE PIPE & PRODUCTS, AND I BELIEVE MR. BATES IS GOING THROUGH THAT LIST.

THE WITNESS: I HAVE ONLY TWO MORE.

ONE WAS JUST A BRIEF COMMENT ON, AND YOU DID ADDRESS IT WITH MR. KING, THAT IN EXHIBITS 16-A AND 16-B, THOSE LIABILITY AMOUNTS PROVIDES FOR NO EXPENSES AT ALL. YOU DIDN'T GET INTO IT, BUT 16-C AND 16-D HAVE WHATEVER EXPENSE ASSUMPTION THE P.B.G.C. IS USING. BUT 16-A AND 16-B HE USED THE [p. 242]

BUCK FORWARD INTEREST RATES WITH NO PROVISION WHATEVER FOR EXPENSES, SAYING THAT THE FUND WOULD HAVE THESE EXPENSES ANYWAY.

THAT MAY BE TRUE, BUT IT WOULD LEAVE THE ONGOING EMPLOYERS WITH THE BURDEN OF PAYING ALL THOSE EXPENSES. AND MY UNDERSTANDING OF THE ACT IS TO TRY, AND CERTAINLY OF OUR TWO-TIER METHOD AND SO ON, IS TO TRY TO LEAVE THE FUND AND THE WITHDRAWING EMPLOYER IN ROUGHLY EQUAL SHAPE. SO IT DOESN'T SEEM FAIR TO HIT THE ONGOING EMPLOYERS WITH ALL OF THE EXPENSES.

Q BY MR. BEERS: DID YOU HAVE ONE LAST ITEM ON YOUR LIST?

A YES. THERE WAS A REMARK ABOUT THE ONGOING VALUATION, AGAIN, MONEY ON HAND VERSUS FUTURE MONEY, AND WHETHER THAT WAS EVER APPLIED IN ONGOING VALUATIONS, AND ALL THAT IS NOT NORMALLY APPLIED. I AM AWARE OF TWO – A VERY LARGE IMPORTANT MULTI-EMPLOYER PLANS WHERE THAT DISTINCTION IS DRAWN. THE SOUTHERN CALIFORNIA CARPENTERS PENSION TRUST USES RIGHT NOW SEVEN PERCENT INTEREST ON ONGOING BASIS AND NINE PERCENT INTEREST ON CURRENT ASSETS ON THE NEXT FIVE YEARS, AND THE NATIONAL BOILERMAKERS – I'M SORRY, THE NATIONAL BAKERY AND CONFECTIONARY WORKERS USES A SIMILAR METHOD. I'M NOT SURE OF THE NUMBERS. THE FUND IS HANDLED BY OUR NEW YORK OFFICE, BUT I KNOW THEY USE THIS APPROACH FOR [p. 243] ONGOING VALUATION

PURPOSES WITH THE DIFFERENCE BETWEEN ASSETS ON HAND, ASSUMING – ASSUME TO EARN HIGHER RETURN THAN OTHER ASSETS, FOR A SHORT PERIOD.

Q THIS CAME OUT IN YOUR DIRECT EXAMINATION, OR MORE ACCURATELY CROSS-EXAMINATION WHEN YOU WERE AN ADVERSE WITNESS THIS MORNING, BUT I WANT TO GO OVER IT NOW IN SOME DETAIL. THE SEGAL COMPANY HAS SPENT A LOT OF TIME COMING UP WITH THIS TWO-TIER METHOD. CAN YOU EXPLAIN TO ME THE IMPORTANCE OF THAT AND WHY THAT ENDS UP WITH A REASONABLE DETERMINATION OF UNFUNDED VESTED LIABILITY AS OPPOSED TO OTHER METHODS FOR VALUING UNVESTED LIABILITY – VESTED LIABILITY?

MR. NELSON: I DON'T WANT TO KEEP OBJECTING AS COMPOUND, BUT I'M NOT SURE HE – IT SOUNDED LIKE THERE WERE THREE QUESTIONS THERE.

MR. BEERS: LET ME BREAK IT DOWN INTO ONE QUESTION.

Q THE SEGAL COMPANY USES A TWO-TIER METHOD TO VALUE THE UNFUNDED VESTED LIABILITY OF A PLAN; IS THAT CORRECT, RIGHT?

A YES.

Q WHAT IS THE IMPORTANCE OF USING THIS TWO-TIER METHOD AS OPPOSED TO USING A SINGLE INTEREST RATE ASSUMPTION TO DETERMINE THE UNFUNDED VESTED LIABILITY OF THE PLAN?

A WELL, IT DEPENDS ON WHAT THE SINGLE INTEREST [p. 244] ASSUMPTION IS. IF THE SINGLE INTEREST ASSUMPTION IS THE VALUATION ASSUMPTION, THE SEGAL TWO-TIER METHOD PRODUCES A LOWER LIABILITY AND A LOWER WITHDRAWAL LIABILITY.

AND THE REASON THAT WE CHOSE THIS METHOD WAS THAT IF YOU REALLY WANTED TO, YOU COULD TAKE THE ASSETS THAT YOU HAD AND GO OUT AND BUY ANNUITIES FOR – AS FAR AS THEY WOULD GO. SO IT SEEMED THAT CURRENT RATES ON ANNUITIES WERE A REASONABLE FIRST STEP IN EVALUATION PROCESS FOR VALUING THE UNFUNDED VESTED LIABILITIES.

AS FOR THE REST OF THE LIABILITIES, WE HAD TO MAKE SOME OTHER DECISION, AND IT SEEMED TO US THAT CURRENT INTEREST RATES, HOWEVER REPRESENTED, WERE NOT REASONABLE. YOU CAN'T SPEND MONEY YOU DON'T HAVE.

THE MOST NATURAL ALTERNATIVE, OR SOME OF THE REASONS MR. KING MENTIONED, NAMELY, THAT'S ALREADY BEEN DONE, IT'S EASY, WAS THE VALUATION INTEREST RATE. IT'S ALREADY BEEN – IT'S ALREADY THERE. YOU DON'T HAVE TO INVENT IT, YOU DON'T HAVE TO THINK ABOUT IT.

AND AS WE THOUGHT ABOUT THIS PROCESS MORE, AND WE THOUGHT ABOUT THE EFFECT OF THE EXPENSE ASSUMPTION, WHICH IS IN THE P.B.G.C. RATES AND NOT IN THE VALUATION INTEREST RATE, THAT IF WE WERE TO REFLECT THE EXPENSES, THAT WOULD INCREASE THAT RATE. [p.

245] AND WE THOUGHT ABOUT THE MORTALITY TABLE AND OUR NONCONSERVATIVE NATURE OF THE MORTALITY TABLE, AND THE FACT THAT THE EMPLOYER'S BASICALLY BEING LOANED THE MONEY DURING THE PAYOUT PERIOD AT THAT VALUATION PERIOD ASSUMPTION RATE, IN THIS CASE SIX PERCENT. ALL OF THESE REASONS SEEMED TO INDICATE THAT ANY CONSERVATISM IN THAT RATE WAS JUSTIFIABLE AND THAT WAS - THOSE WERE THE REASONS THAT WE USED IT.

THERE WAS ONE OTHER FACTOR, AND AGAIN TO USE THIS SIX PERCENT RATE OR THE CONSERVATISM IN THE SIX PERCENT RATE TO MAKE UP FOR NONCONSERVATISM IN OTHER ASSUMPTIONS, AND THAT IS THAT WHEN AN EMPLOYER WITHDRAWS FROM A PLAN, SHUTS DOWN A PLANT, VERY OFTEN HIS EMPLOYEES ARE INCLINED TO RETIRE EARLIER THAN THEY OTHERWISE WOULD HAVE DONE. IF THEY'RE NOT WORKING, THEY HAVE MORE REASON TO RETIRE EARLY. AND THAT HAS AN EFFECT BECAUSE THE EARLY RETIREMENT FACTORS IN THE PLAN ARE MORE GENEROUS TO THE EMPLOYEES THAN A STRICT ACTUARIAL EQUIVALENT.

IF WE REALLY WANTED TO GO IN AND SAY, WELL, THE EMPLOYEES OF THIS EMPLOYER ARE MORE LIKELY TO RETIRE EARLY, THEREFORE WE SHOULD USE LOWER RETIREMENT RATES. BUT THEN WE WOULD HAVE TO THINK ABOUT HOW MUCH LOWER, AND IT WOULD BE ALL - ALL A MESS.

BUT WE JUST FELT, HERE WAS YET ANOTHER [p. 246] FACTOR, IS THE FACT THAT THE EXPERIENCE OF THE WITHDRAWING EMPLOYER WERE LIKELY TO HAVE LOWER RETIREMENT AGES. THERE WAS ANOTHER FACTOR FOR ALLOWING SOME CONSERVATISM IN THE VALUATION INTEREST RATE USED FOR THE REST OF THE WITHDRAWAL LIABILITY CALCULATION.

Q BACK IN 1980 AND '81, DID THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA HAVE SUFFICIENT ASSETS ON HAND TO FUND THE VESTED BENEFITS EXISTING AT THAT TIME?

A NO, NOT EVEN CLOSE. I THINK I CALCULATED THE MARKET VALUE OF ASSETS, DIVIDED BY THE P.B.G.C. LIABILITIES FOR ALL VESTED BENEFITS AS BEING 29.5 PERCENT.

Q IS THAT EVEN ENOUGH TO COVER THE THEN CURRENTLY RETIRED LIVES?

A NOT EVEN CLOSE.

Q WHAT ABOUT THE STATE OF THE FUND TODAY?

A IT'S BETTER, PARTIALLY BECAUSE THE CONTRIBUTION RATE HAS BEEN INCREASED. AND ALSO WE'VE HAD SOME FAVORABLE INVESTMENT RESULTS, AND WE'VE COLLECTED SOME WITHDRAWAL LIABILITY. BUT THE FUND ASSETS ARE STILL NOWHERE NEAR THE PENSIONER LIABILITY.

Q IS THE FACT THAT YOU HAVE TO CONSIDER IN DECIDING THE REASONABLE INVESTMENT

YIELD THAT YOU CAN [p. 247] EXPECT FROM THE FUND HAVING TO ALLOW FOR LIQUIDITY IN THE ASSETS OF THE TRUST, AND HOW DOES THAT AFFECT – FIRST OF ALL, GO AHEAD AND ANSWER THAT, YES OR NO.

A WHAT I MEAN, NEEDS FOR LIQUIDITY AFFECTS YOUR ACTUAL INVESTMENTS. IF YOU HAVE A NEGATIVE CASH FLOW, OBVIOUSLY YOU CAN'T PUT ALL YOUR MONEY OUT FOR 30-YEAR ZERO COUPON BONDS. IF YOU NEED THE MONEY FOR BENEFIT PAYMENTS, YOU CAN'T HAVE IT INVESTED SIMULTANEOUSLY IN A LONG-TERM INSTRUMENT.

Q HAS THE TRUST HERE ACTUALLY HAD A NEGATIVE CASH FLOW?

MR. NELSON: WHEN?

MR. BEERS: AT ANY TIME.

THE WITNESS: IF BY NEGATIVE CASH FLOW, YOU MEAN, AN EXCESS OF BENEFIT PAYMENTS AND EXPENSES OVER CONTRIBUTIONS –

Q BY MR. BEERS: THAT'S WHAT I MEAN.

A – THE ANSWER IS YES, THEY HAVE HAD A NEGATIVE CASH FLOW SINCE 1982 AT LEAST, AND THEY STILL DO. WITH INVESTMENT INCOME, THE FUND HAS CONTINUED TO GROW. SO IF YOU DEFINE THE NEGATIVE CASH FLOW EXCLUSIVE OF INVESTMENT RETURNS, THEY'VE HAD A NEGATIVE CASH FLOW.

Q WOULD YOU, IN YOUR PROFESSIONAL OPINION AS AN ACTUARY, CONSIDER THE ESTIMATES GIVEN BY MR. KING IN USING THE BUCK FORWARD INTEREST RATES AS A [p. 248] REASONABLE BASIS FOR DETERMINING WITHDRAWAL LIABILITY?

A NO, BECAUSE THEY DON'T REFLECT EXPENSES, AND THEN – AT ALL. AND, NO, BECAUSE THEY DON'T CONTAIN THE CONSERVATISM THAT'S NEEDED TO MAKE UP FOR LACK OF CONSERVATISM IN SOME OTHER ASSUMPTIONS THAT I'VE DISCUSSED. AND FINALLY, EVEN IF THOSE WERE GRANTED SOMEHOW, YOU COULD NOT APPLY THE BUCK FORWARD INTEREST RATES TO MONIES THAT YOU DIDN'T HAVE ON HAND.

Q IS AN IMPORTANT FACTOR IN MAKING YOUR ACTUARIAL DETERMINATIONS THE FACT THAT BENEFITS GO OUT 30, 40, 50 OR EVEN 60 YEARS?

A YES.

Q HOW DOES THAT AFFECT YOUR ASSUMPTIONS ON THE DISCOUNT RATE FOR THE UNFUNDED VESTED LIABILITY, AND WHAT KIND OF INVESTMENT WOULD BE NECESSARY TO TAKE CARE OF THAT UNFUNDED VESTED LIABILITY?

MR. NELSON: I DON'T WANT TO BE TOO PICKY.

THE ARBITRATOR: THAT'S TWO QUESTIONS.

MR. BEERS: THAT'S TWO QUESTIONS, BUT HE CAN ANSWER IT WITH A –

MR. NELSON: I'LL OBJECT DEPENDING ON WHAT I HEAR IN THE FIRST ONE.

THE WITNESS: I'LL ANSWER THE SECOND ONE FIRST. THERE ARE REALLY NO 60- OR 70-YEAR INVESTMENTS, SO [p. 249] FOR THAT SMALL PORTION OF THE LIABILITY, THEY'RE REALLY GOING TO BE PAID OUT WAY OUT THERE. YOU INVEST IN SOMETHING AND YOU'RE GOING TO REINVEST A FEW TIMES ALONG THE WAY IN ALL PROBABILITY, AND MAYBE YOU BETTER READ ME THE FIRST QUESTION AGAIN.

Q BY MR. BEERS: IS THERE ANY WAY TO GUARANTEE WHAT THE INTEREST RATE IS GOING TO BE ONE YEAR FROM NOW?

A OF COURSE – OF COURSE NOT. AN INSURANCE COMPANY SOMETIMES WILL GUARANTEE A RATE FOR NEW MONEY RECEIVED DURING A CALENDAR YEAR, USUALLY AS I UNDERSTAND IT, FOR THE REST OF THAT CALENDAR YEAR. AND THEY MAY QUOTE THAT AT THE BEGINNING OF THE YEAR AS THEIR NEW MONEY RATE. SO THAT'S ALMOST A YEAR. BUT THEY'RE ON A RISK WHEN THEY DO THAT. SO I THINK, YOU KNOW, AS FAR AS GUARANTEES, THE ANSWER IS BASICALLY NO.

Q DO YOU HAVE A FEEL FOR WHAT THE DISCOUNT RATE WOULD COME OUT TO BE IF YOU TOOK THE TWO-TIER APPROACH OF SEGAL FOR THE TRUST AND BLENDED IT TOGETHER INTO ONE RATE?

A I HAVEN'T DONE THAT CALCULATION.

Q IS THERE ONE THAT YOU COULD ROUGHLY DO IN YOUR HEAD?

A LET'S SEE –

MR. NELSON: I GUESS THE FIRST QUESTION, IS THERE [p. 250] A CALCULATION THAT YOU COULD ROUGHLY DO IN YOUR HEAD, AND THEN WHETHER YOU CAN DO IT.

THE ARBITRATOR: I THINK THE ANSWER WAS HE HADN'T DONE IT.

THE WITNESS: THERE IS A CALCULATION. HOW ACCURATELY I COULD DO IT IN MY HEAD IS AN IMPEACHABLE –

MR. BEERS: THAT PROBABLY WON'T BE NECESSARY.

Q LET ME JUST DRAW OUT SOME NUMBERS THAT WILL GIVE AN INDICATION OF WHAT THAT NOTED RATE MIGHT END UP BEING.

MR. NELSON: WAIT A MINUTE NOW.

THE ARBITRATOR: START OVER AGAIN. WITHDRAW THE QUESTION.

MR. BEERS: WITHDRAW THE QUESTION.

Q ONE PART OF THE TWO-TIER APPROACH IS TO DETERMINE THE UNFUNDED VESTED LIABILITY TO THE EXTENT CURRENT ASSETS ARE AVAILABLE TO PAY THEM; IS THAT CORRECT?

A YES.

Q HOW MUCH OF THE UNFUNDED VESTED LIABILITY CAN BE COVERED BY THE CURRENT ASSETS OF THE TRUST BACK IN '81?

A DECEMBER 31, 1980. IT WAS 29 AND A HALF PERCENT.

Q WHICH STATE THE OBVIOUS, HOW MUCH DOES THAT [p. 251] LEAVE TO BE COVERED BY FUTURE ASSETS?

A SEVENTY AND A HALF PERCENT. I THINK I CAN DO THAT WITHOUT MY CALCULATOR.

Q THEREFORE, THE P.B.G.C. RATES WOULD BE APPLIED TO THE – TO APPROXIMATELY 29 PERCENT OF THE UNFUNDED VESTED LIABILITY?

A TWENTY-NINE PERCENT OF THE VESTED LIABILITY.

Q PARDON ME, THE UNFUNDED VESTED LIABILITY?

A NOT UNFUNDED.

Q VESTED LIABILITY?

A VESTED LIABILITY.

Q THEN THE SIX PERCENT FUNDING RATE WOULD HAVE BEEN APPLIED TO THE APPROXIMATELY 71 PERCENT –

A YES.

Q – OF THE VESTED LIABILITY RELYING ON FUTURE ASSETS FOR PAYMENT?

A YES.

Q SO YOU WOULD END UP WITH AN OVERALL RATE IN EXCESS OF SIX PERCENT; IS THAT CORRECT?

A YES.

Q WHAT IS YOUR OPINION AS TO THE RATE USED BY THE MAJORITY OF PENSION FUNDS IN CALCULATING WITHDRAWAL LIABILITY FOR WITHDRAWALS THAT TOOK PLACE IN 1981?

A I WOULD PREFER TO ANSWER IT IN TERMS OF THE [p. 252] MAJORITY OF PENSION ACTUARIES. I THINK THE MAJORITY OF PENSION ACTUARIES VALUING MULTI-EMPLOYER PLANS WERE USING THE PLANS VALUATION ASSUMPTION. I TAKE THAT FROM CONVERSATIONS AT THE ANNUAL ENROLLED ACTUARIES MEETING WHERE THIS QUESTION IS ASKED EVERY YEAR AND THERE'S USUALLY A SHOW OF HANDS, AND SO I HAVE AN IMMEDIATE SENSE OF THAT.

NOW, EVERYONE WHO RAISES HIS HAND ISN'T VALUING AN EQUAL NUMBER OF PLANS, AND PARTICULARLY THE SEGAL PEOPLE HAVE MORE THAN THEIR SHARE. SO IT COULD BE THAT HALF OR MORE OF THE PLANS ARE USING EITHER THE SEGAL METHOD OR OTHER METHODS THAT USE THE CURRENT INTEREST RATES TO THE EXTENT THEY HAVE ASSETS, OR CURRENT INTEREST RATES TO THE EXTENT THAT THE WITHDRAWING EMPLOYER'S WILLING TO PAY A LUMP SUM.

ANOTHER METHOD THAT IS USED IS SO-CALLED SELECT AND ULTIMATE INTEREST RATES WHERE A PERSON ASSUMES ONE INTEREST RATE FAIRLY HIGH FOR YEAR ONE, AND THEN A LOWER RATE FOR YEAR TWO, AND A LOWER RATE FOR YEAR THREE AND SO ON, YEAR TEN THEY WOULD HAVE SOME USUALLY QUITE LOW RATE AND SOME FIRMS WOULD CALCULATE WITHDRAWAL LIABILITY USING THAT METHOD. I KNOW DAN MC GINN'S FIRM, BEFORE IT WAS BOUGHT BY MERCER, USED A METHOD LIKE THAT.

Q DO YOU KNOW OF ANY OTHER METHODS USED TO [p. 253] CALCULATE WITHDRAWAL LIABILITY?

A I WOULD REPHRASE THE QUESTION. DO I KNOW OF ANY OTHER INTEREST RATES OR METHODS OF APPLYING INTEREST RATES? I WOULD SAY I'M NOT AWARE OF ANY.

Q ONE LAST QUESTION I HAVE IS, DO YOU KNOW OF ANY FUND, ANY MULTI-EMPLOYER PENSION FUND USING RATE ASSUMPTIONS AS HIGH AS THOSE USED BY MR. KING?

MR. NELSON: I THINK I'M GOING TO OBJECT AT THIS TIME AT THIS POINT AS IRRELEVANT TO THIS LIMITED PURPOSE. TO THE EXTENT THAT HE KNOWS BASED ON WHAT MARTIN SEGAL DOES, AND THEY REPRESENT A MAJORITY OF THE FUNDS, I THINK IT MISCONVEYS THE IMPRESSION TO THE EXTENT HE'S ASKING FOR THINGS BEYOND HIS KNOWLEDGE OF WHAT MARTIN SEGAL DOES, CALLS FOR SPECULATION WITHOUT FOUNDATION.

Q BY MR. BEERS: ANSWER WITH YOUR PERSONAL KNOWLEDGE AS TO WHETHER OR NOT YOU KNOW OF ANY FUNDS THAT USE INTEREST RATES – USE THE RATES, THE SAME OR HIGHER THAN MR. KING USED IN HIS DETERMINATION OF WITHDRAWAL LIABILITY.

A I CAN'T SAY THAT I KNOW OF ANY. I TAKE MR. KING AT HIS WORD WHEN HE SAYS THAT IF BUCK HAS MULTI-EMPLOYER PLANS WITH WITHDRAWAL LIABILITY, THAT THEY USE THE METHOD. I THINK HE RESPONDED THAT THERE WERE AT MOST A SMALL NUMBER OF THOSE.

MR. BEERS: NO FURTHER QUESTIONS.

[p. 254] MR. NELSON: COULD I HAVE ABOUT SEVEN MINUTES?

THE ARBITRATOR: SURE.

MR. NELSON: MAYBE EIGHT.

THE ARBITRATOR: TAKE MORE IF YOU NEED IT.

(SHORT RECESS.)

CROSS-EXAMINATION

BY MR. NELSON:

Q ONE OF THE THINGS, MR. BATES, THAT TROUBLED YOU ABOUT MR. KING'S CALCULATIONS WERE THAT HE DID NOT ACCOUNT FOR ADMINISTRATIVE EXPENSES IN EXHIBITS 16 – COMPANY EXHIBITS 16-A AND 16-B; IS THAT CORRECT?

A THAT'S CORRECT.

Q I SUPPOSE FOR PURPOSES OF CLARITY OF THE RECORD, I'M LOOKING AT EXHIBIT "H," WHICH IS THE FINANCIAL STATEMENT FOR DECEMBER – DATED DECEMBER 31, 1981. FIRST OF ALL, DOES MARTIN SEGAL PREPARE THE FINANCIAL STATEMENTS?

A NO. THE – AS EXHIBIT "H" INDICATES ON THE BOTTOM OF PAGE 1, THEY'RE PREPARED, IN THIS CASE, BY MILLER, ARASE, KAPLAN, SHEETS AND COMPANY, CERTIFIED PUBLIC ACCOUNTANTS.

Q LET ME DIRECT YOUR ATTENTION TO PAGE 8 OF COMPANY EXHIBIT "H." DO YOU HAVE AN OPINION AS TO WHETHER THE ACTUAL RATE OF GENERAL ADMINISTRATIVE [p. 255] EXPENSES AS A PERCENTAGE OF EMPLOYER CONTRIBUTION EXCEEDED YOUR ACTUARIAL PROJECTION FOR 1981?

A FOR YEAR 1981, IT LOOKS LIKE WE WERE REASONABLY CLOSE. JUST A SECOND. WE HAD ESTIMATED ONE MILLION TWO HUNDRED THOUSAND IN 1981, AND THE ACTUAL WAS ONE MILLION 051,976, ACCORDING TO THIS STATEMENT. AND I WOULD HAVE TO LOOK AT IT IN SOME DETAIL TO MAKE SURE THAT EVERYTHING THAT WHAT WE CALL ADMINISTRATIVE EXPENSE HE DOES. BUT ASSUMING THAT TO BE THE CASE, THE EXPERIENCE THAT YEAR WAS MUCH LESS THAN WHAT WE HAD ASSUMED FOR 1981, FOR PURPOSES OF THE ONGOING VALUATION. THIS DOESN'T AFFECT THE WITHDRAWAL LIABILITY.

Q BUT WITH RESPECT TO AT LEAST 1981, AND LOOSELY DEFINING ADMINISTRATIVE EXPENSES AS WHAT IT COST TO OPERATE THE PLAN, IT DIDN'T COST AS MUCH TO OPERATE THE PLAN IN 1981 AS YOU PROJECTED IT WOULD IN YOUR ACTUARIAL EVALUATION?

A THAT'S CORRECT. I'M LOOKING TO TRY AND MAKE SURE THAT WE HAVE EXAMPLES HERE, AND BASED ON EXHIBIT "E," PAGE 13, WE DON'T.

Q WHAT'S MISSING?

A EXHIBIT "E," PAGE 13, GOING BACK ONE YEAR TO 1980, WHICH IS THE ONLY YEAR THAT'S COMMON TO BOTH, WE HAVE ADMINISTRATIVE EXPENSES ONE MILLION 103,527 IN EXHIBIT "E," BUT WE HAVE ONLY 8,088 FOR [p. 256] THE SAME YEAR IN EXHIBIT "H." SO I WOULD HAVE TO LOOK A LITTLE BIT TO SEE WHAT THE REASON FOR THAT WAS. IT MAY BE THAT SOME KINDS OF FEES ARE CONSIDERED ADMINISTRATIVE EXPENSES FOR ONE PURPOSE AND NOT FOR ANOTHER. I DON'T KNOW.

Q LET'S GO ON TO SOMETHING MAYBE A LITTLE BIT MORE GENERAL THEN.

A PROBABLY THAT I WOULD CALL CORPORATE COMPANY TRUSTEE FEE, THAT'S A BANK CHARGE. THEY HOLD THE MONEY AND WRITE THE CHECKS AND SO ON, AND SOMETIMES THAT FEE IS CONSIDERED TO BE ADMINISTRATIVE BECAUSE THEY'RE WRITING THE CHECKS AND PAYING THE POSTAGE AND ALL THAT. SOMETIMES IT'S CONSIDERED

INVESTMENT BECAUSE THEY ALSO HOLD THE MONEY.

Q I THINK YOU SAID THAT THE TRUST FUND HAS BEEN EXPERIENCING A NEGATIVE CASH FLOW SINCE 1982.

MR. BEERS: OF COURSE AS HE DEFINED CASH FLOW.

THE WITNESS: YEAH, I DEFINED – I SAID IF YOU DEFINE CASH FLOW AS I DID, WHICH IS CONTRIBUTION INCOME MINUS BENEFIT PAYMENTS AND EXPENSES, THERE WAS A NEGATIVE CASH FLOW. INVESTMENT INCOME MADE THE FUND CONTINUE TO GROW.

Q BY MR. NELSON: LET ME DEFINE CASH FLOW A LITTLE BIT DIFFERENTLY.

WITH RESPECT TO THE PERIOD, THE YEAR 1982 THAT I THINK WE WERE JUST DISCUSSING, THERE WAS MORE [p. 257] MONEY IN THE FUND AT THE END OF THE YEAR THAN THERE WAS IN THE BEGINNING; WOULD THAT BE CORRECT?

A I THINK THE FUND ASSETS HAVE GONE UP EVERY YEAR.

Q WOULD THAT NECESSARILY MEAN THAT IRRESPECTIVE OF THE SOURCE OF THE INCOME, WHATEVER SOURCE THAT MIGHT BE, WHETHER IT'S CONTRIBUTIONS OR INVESTMENT PERFORMANCE, THE FUND IS EARNING OR OBTAINING MORE FUNDS AS ASSETS THAN IT'S PAYING OUT ON BENEFITS ON AN ANNUALIZED BASIS?

A YES. IF YOU INCLUDE INVESTMENT INCOME, THE FUND HAS CONTINUED TO GROW, EXCEPT CALENDAR YEAR 1975 I SEE IT WENT DOWN. AND '74. LOOKING AT EXHIBIT "F,", PAGE 21.

Q I THINK YOU ALSO TESTIFIED THAT FOR PURPOSES OF AT LEAST 1982 AND MAYBE THE OTHER YEARS AFTERWARDS, THAT IT'S THE INVESTMENT PERFORMANCE THAT'S – FOR PURPOSES OF AT LEAST 1982, THE INCREASE IN THE ASSETS OF THE TRUST FUND IS ATTRIBUTABLE DIRECTLY TO THE IMPROVED INVESTMENT PERFORMANCE AS OPPOSED TO CONTRIBUTION INCREASES.

A THAT'S CORRECT.

Q DOESN'T THAT NECESSARILY MEAN THAT THE THE FUND'S ACTUAL INVESTMENT PERFORMANCE IS EXCEEDING YOUR ACTUARIAL PROJECTION FOR THAT PERFORMANCE?

A ON AVERAGE, YES, FOR THAT YEAR.

[p. 258] Q. WOULD IT ALSO MEAN –

A WHEN I SAY ON AVERAGE, I MEAN, ON AVERAGE OF THE FIVE INTEREST RATES THAT ARE USED IN THIS WITHDRAWAL LIABILITY CALCULATION.

Q THE INVESTMENT INCOME THAT IS CAUSING THE INCREASE IN THE FUND IS BASED UPON THE ASSETS THAT YOU'RE ACCRUING FROM – YOU'RE OBTAINING FROM YEAR TO YEAR INTO THE FUTURE PAST 1982, ISN'T IT?

A THE INVESTMENT INCOME IS BASED ON THE INVESTMENTS OF THE ASSETS. I'M NOT SURE I SEE THE POINT OF THE QUESTION.

Q YOUR ACTUARIAL REVIEW PROJECTS TO A CERTAIN EXTENT WHAT THE GROWTH IN THOSE ASSETS AND THE INTEREST THAT WILL BE EARNED ON THOSE ASSETS IN FUTURE YEARS WILL BE?

A WELL, ACTUALLY IT DOESN'T DIRECTLY. WE DISCOUNT THINGS TO THE PRESENT, SO WE DON'T PROJECT ASSETS OUT. WE DISCOUNT LIABILITIES BACK.

Q YOU MENTIONED EARLIER THAT YOU COULD NOT DETERMINE WITH ANY DEGREE OF CERTAINTY WHAT INTEREST RATES WOULD BE FROM ONE YEAR TO THE NEXT ON ANY GIVEN ASSETS THAT YOU HAD ON THE PRESENT –

A MY RESPONSE WAS, I BELIEVE, NOT WITH RESPECT TO ANY PARTICULAR CLASS OF ASSETS, BUT ON A MORE GENERIC QUESTION ABOUT WHAT INTEREST RATES WOULD BE IN THE FUTURE. THAT WAS HOW I UNDERSTOOD THE [p. 259] QUESTION, AND THAT WAS THE BASIS OF MY ANSWER. OF COURSE THERE ARE INSURANCE CONTRACTS THAT PROVIDE "X" INTEREST THIS YEAR, "Y" INTEREST NEXT YEAR AND "Z" INTEREST THE YEAR AFTER FOR A FIXED PERIOD, FOR ASSETS THAT ARE INVESTED THAT –

Q AND SOME OF THOSE KINDS ARE, I GUESS, A FORM OF ANNUITY CONTRACT, AREN'T THEY?

A GENERALLY CALLED GUARANTEED INTEREST CONTRACTS, G.I.C.'S.

Q THOSE GUARANTEED INTEREST CONTRACTS WOULD BE NEGOTIATED, I THINK YOU SAID, AT LEAST COULD BE NEGOTIATED AT THE BEGINNING OF THE YEAR, AND WOULD COVER ALL CONTRIBUTIONS COMING IN DURING THAT 12-MONTH PERIOD?

A I'M NOT AN EXPERT ON HOW THESE THINGS WORK. I'VE HEARD OF SUCH CONTRACTS AND I KNOW THEY EXIST. BUT I'M FAR FROM AN EXPERT ON HOW INSURANCE COMPANY INVESTMENT PRODUCTS WORK.

Q ARE YOU FAMILIAR WITH WHAT DURATION THOSE GUARANTEED INVESTMENT CONTRACTS WOULD RUN ON THE ONE-YEAR CONTRIBUTIONS?

A ONE USUALLY SEES QUOTES FOR ONE YEAR, THREE, FIVE AND SEVEN YEARS. IT SEEMS TO BE NUMBERS THAT I SEE INCLUDED IN CHARTS THAT CROSS MY DESK.

Q IF YOU HAD ONE OF THOSE GUARANTEED INVESTMENT CONTRACTS THAT HAD A TERM OF FIVE YEARS, [p. 260] YOU COULD DETERMINE WHAT INTEREST RATE WOULD BE PAID ON MONEY THAT YOU DID NOT HAVE IN HAND YET OVER THE NEXT FIVE-YEAR PERIOD, COULD YOU NOT?

A FOR THE TYPICAL CONTRACT, NO. THE TYPICAL CONTRACT, YOU HAVE TO PUT ALL THE MONEY IN UP FRONT. SOME OF THESE CONTRACTS WILL ALLOW YOU TO PUT MONIES IN OVER A

PERIOD, BUT THEN THE GUARANTEES ARE MUCH WORSE, BECAUSE OBVIOUSLY THEY'RE LEAVING THEMSELVES OPEN TO ANTISELECTION, IF THEY'RE GUARANTEEING YOU A RATE OF 12 PERCENT OR WHATEVER FOR THE FIRST YEAR, THAT - LET'S SAY THEY'RE GUARANTEEING YOU A HIGH RATE TO ATTRACT THE MONEY FOR THE FIRST YEAR, THEY'RE LIKELY TO GUARANTEE THAT FOR A LESS - FOR A SHORTER PERIOD BECAUSE THEY RUN THE RISK THAT YOU'LL PUT THE MONEY IN IF IT'S FAVORABLE TO YOU, AND YOU WON'T PUT THE MONEY IN IF IT'S NOT FAVORABLE TO YOU.

Q EVEN IF IT'S AT A LESS FAVORABLE RATE, THOSE COMPANIES WHICH OFFER THE LONGER DURATION CONTRACTS BASED UPON FUTURE CONTRIBUTIONS WOULD GUARANTEE THE INTEREST RATE FOR A PERIOD OF TIME IN THE FUTURE UP TO FIVE YEARS?

A MY UNDERSTANDING OF THOSE KINDS OF CONTRACTS IS THAT THE WINDOW FOR GUARANTEEING ANYTHING ON NEW MONEY IS VERY SHORT, AND IT EXTENDS NO FURTHER THAN THE END OF THE CURRENT YEAR. THAT'S THE NORMAL CONTRACT - THE MOST NORMAL CONTRACT IS TO PUT ALL [p. 261] THE MONEY UP FRONT, AND SOME YOU CAN PUT MONIES IN UP TO THE END OF SOME FIXED PERIOD. AND THERE'S OFTEN LIMITS ON HOW MUCH YOU CAN PUT IN AS WELL, BECAUSE THEY WANT TO LIMIT THEIR RISK.

Q THERE WAS SOME CONCERN EXPRESSED ABOUT MAINTAINING THE TRUST FUND'S LIQUIDITY REQUIREMENTS. YOU DID NOT EXPRESS AN

OPINION THAT USING, SAY, THE BUCK FORWARD INTEREST RATES WOULD PRECLUDE THE FUND FROM SATISFYING ITS LIQUIDITY REQUIREMENTS, DID YOU?

A MY UNDERSTANDING OF THE USE OF THE BUCK FORWARD INTEREST RATES IS A METHOD OF CALCULATING LIABILITIES, WHICH DOESN'T HAVE ANYTHING TO DO WITH LIQUIDITY OR MONIES GOING IN AND OUT OF THE FUND.

Q TO THE EXTENT THAT THE MONEY ON HAND WAS USED TO PURCHASE GOVERNMENT SECURITIES, THAT WOULDN'T ADVERSELY AFFECT, THEN, THE LIQUIDITY OF THE TRUST FUND?

A WELL, MAYBE I MISUNDERSTAND THE QUESTION.

TO GO TO THE EXTREME CASE FIRST AND THEN BACK OFF IF WE NEED TO, IF THE FUND DECIDED THAT IT WANTED TO PUT ALL OF ITS MONEY INTO A 30-YEAR ZERO COUPON BOND, THAT MEANS YOU PUT ALL THE MONEY IN TODAY AND YOU GET IT BACK 30 YEARS LATER, NOTHING HAPPENS IN BETWEEN. THE FUND COULDN'T DO THAT. IT HAS LIQUIDITY NEEDS THAT WOULD PREVENT IT FROM DOING THAT. IT HAS TO GET SOME OF THAT INVESTMENT INCOME [p. 262] TO USE FOR BENEFIT PAYMENTS BECAUSE BENEFIT PAYMENTS EXCEED NET CONTRIBUTIONS.

Q GOVERNMENT OBLIGATIONS, T-BILLS, BONDS AND THE LIKE, WOULD COME IN INVESTMENT PERIODS FROM 30 DAYS TO 30 YEARS, WOULD THEY NOT?

A SUCH INVESTMENTS ARE AVAILABLE.

Q SO JUST BECAUSE THE TRUST FUND WAS USING GOVERNMENT SECURITIES WOULD NOT NECESSARILY PRECLUDE IT FROM SELECTING A SPREAD OF SECURITIES THAT WOULD SATISFY ITS LIQUIDITY REQUIREMENTS?

A THAT'S CORRECT.

(BRIEF PAUSE.)

Q BY MR. NELSON: MR. BEERS ASKED YOU A SERIES OF QUESTIONS ABOUT WHAT THE MAJORITY OF OTHER ACTUARIES OR OTHER PLANS WERE DOING WITH RESPECT TO VARIOUS ACTUARIAL ASSUMPTIONS. I THINK, IF I RECALL IT CORRECTLY, IT WAS SOMEWHAT NARROWED TO MULTI-EMPLOYER PLANS.

A WITH RESPECT TO WITHDRAWAL LIABILITY, THAT WOULDN'T NARROW ANYTHING.

Q I THINK YOU ALSO MENTIONED – I GUESS I'LL JUST GET STRAIGHT TO THE POINT. WHEN WE TALK ABOUT WHAT THE MAJORITY OF OTHER ACTUARIES ARE DOING WITH RESPECT TO WITHDRAWAL LIABILITY AND MULTI-EMPLOYER PENSION PLANS, AREN'T WE REALLY TALKING ABOUT WHAT MARTIN SEGAL IS DOING?

[p. 263] A WELL, WHEN I SAY OTHER ACTUARIES, I MEAN, NONSEGAL ACTUARIES. I THINK WE'VE ESTABLISHED WHAT SEGAL ACTUARIES ARE DOING. SO WHEN I SAY OTHER ACTUARIES, I DON'T MEAN OTHER THAN ME, I MEAN OTHER THAN SEGAL.

Q WHEN YOU SPEAK, HOWEVER, OF WHAT THE MAJORITY OF ACTUARIES ARE DOING, ARE YOU EXCLUDING WHAT THE SEGAL ACTUARIES ARE DOING?

MR. BEERS: ARE YOU SPEAKING IN THE ABSTRACT OR –

MR. NELSON: IN THE GENERAL.

MR. BEERS: IT MIGHT VARY ACCORDING TO THE CONTEXT, I DON'T KNOW.

THE WITNESS: MY SENSE IS THAT THE MAJORITY OF ACTUARIES WHO SIGN OFF ON WITHDRAWAL LIABILITY CALCULATIONS ARE USING THE PLAN'S INVESTMENT RETURN ASSUMPTION TO CALCULATE WITHDRAWAL LIABILITY.

Q BY MR. NELSON: I GUESS WHAT I'M TRYING TO GET AT –

A INCLUDING SEGAL.

Q – IS WHETHER GIVEN THE MARKET SHARE THAT SEGAL'S GOT, WHETHER THERE IS REALLY ANY ADDITIONAL MEANING TO THE TERM WHAT A MAJORITY OF THE ACTUARIES ARE DOING. I'M TRYING TO DETERMINE WHETHER THERE'S ANY PRACTICAL DIFFERENCE BETWEEN A DESCRIPTION, MAJORITY OF ACTUARIES AND WHAT MARTIN SEGAL IS [p. 264] DOING. ARE THOSE TWO TERMS SYNONYMOUS?

A NO, THEY'RE NOT SYNONYMOUS. AS I INDICATED, I BELIEVE WE HAVE 25 TO 30 PERCENT OF THE MULTI-EMPLOYER MARKET, AND THAT WOULD

LEAVE A MAJORITY OF PLANS, AND PROBABLY A LARGER MAJORITY OF ACTUARIES, TO BE NONSEGAL PEOPLE.

Q ARE YOU FAMILIAR WITH THE CONCEPT REFERRED TO AS BOND DEDICATION, AS THAT TERMS IS APPLIED TO PENSION PLANS?

A YES.

Q COULD YOU DESCRIBE WHAT THAT IS?

A WELL, THE IDEA OF DEDICATING BONDS IS TO TRY TO SELECT BONDS WHOSE COUPON YIELDS AND REDEMPTION VALUES, AS THEY ARE RECEIVED BY THE FUND, WILL MATCH THE BENEFIT PAYMENTS AND EXPENSES PAID BY THE FUND. USUALLY THIS IS DONE FOR AN IDENTIFIED GROUP OF PARTICIPANTS, SUCH AS THE PENSIONERS ON THE ROLLS. OF COURSE, YOU CAN'T DEDICATE MORE THAN YOU'VE GOT, SO YOU COULDN'T DEDICATE MORE THAN THE ASSETS YOU HAVE INVESTED USUALLY IN BONDS.

Q APPLYING THAT BOND DEDICATION CONCEPT THAT YOU JUST DESCRIBED TO THIS PARTICULAR PENSION PLAN AS IT EXISTED IN DECEMBER 1980, WHAT IS YOUR ESTIMATE OF PLANS ASSETS REQUIRED ON HAND TO COVER THE PRESENT VALUE OF VESTED BENEFITS?

A I DON'T THINK THAT HAS TO DO WITH DEDICATED [p. 265] BONDS. I MEAN, THAT'S THE VESTED LIABILITY CALCULATIONS THAT WE'VE – THAT WE'VE INDICATED. IF YOU'RE SAYING WHAT AMOUNT OF MONEY INVESTED IN BONDS WOULD

WE HAVE TO HAVE TO PAY OFF ALL THE LIABILITIES – IS THAT WHAT YOU'RE ASKING?

Q LET ME ASK IT THIS WAY: DO YOU THINK THE AMOUNT OF BONDS THAT YOU'D HAVE TO HAVE ON HAND DEDICATED WOULD BE EQUAL TO, LESS THAN, OR GREATER THAN MR. KING'S CALCULATION FOR THE PRESENT VALUE OF VESTED BENEFIT USING THE BUCK FORWARD RATE?

A HIS METHOD WOULD PRODUCE A VERY LOW LIABILITY, AND HENCE A LOW AMOUNT OF BONDS REQUIRED, AND FOR THE REASONS I INDICATED. I THINK YOU WOULD NEED MORE MONEY THAN THAT, HOWEVER YOU INVESTED IT.

THERE'S A FURTHER POINT, OF COURSE, THAT YOU CAN'T GET DEDICATED BONDS THAT GO OUT MORE THAN 30 YEARS, AND SOME OF YOUR LIABILITIES GO WELL BEYOND THAT. SO THERE'S A PRACTICAL LIMIT HOW ACCURATE ANY KIND OF DEDICATION COULD BE, EVEN IF YOU HAD ALL THE MONEY.

Q WHAT PERCENTAGE OF THE FUND LIABILITY WOULD YOU PROJECT WOULD EXCEED 30 YEARS?

A I HAVEN'T THOUGHT OF IT IN THOSE TERMS. I WOULD JUST, OFF THE SEAT OF THE PANTS, I WOULD SAY 20 TO 30 PERCENT OF THE LIABILITIES.

Q WOULD EXCEED A 30-YEAR COMMITMENT?

[p. 266] A POSSIBLY. SOME OF THE CURRENT PENSIONERS WILL EVEN LIVE BEYOND 30 YEARS. SO PEOPLE WHO ARE NOT RETIRED WILL LIVE BEYOND

30 YEARS. MAYBE THAT'S TOO HIGH. MAYBE IT SHOULD BE 10 OR 15. I HAVEN'T THOUGHT ABOUT IT.

Q YOU MENTIONED TWO TRUST FUNDS THAT YOU ARE AWARE OF THAT DIFFERENTIATED BETWEEN MONEY ON HAND AND MONEY THEY HAD NOT YET RECEIVED FOR FUNDING PURPOSES, I THINK?

A YES.

Q THAT WAS SOUTHERN CALIFORNIA CARPENTERS TRUST FUND AND THE NATIONAL BAKERY AND CONFECTIONARY WORKERS.

A YES.

Q YOU SAID THE NATIONAL BAKERY AND CONFECTIONARY WORKERS WERE HANDLED THROUGH THE NEW YORK OFFICE. I PRESUME THAT'S THE NEW YORK OFFICE OF MARTIN SEGAL?

A THAT'S CORRECT.

Q DOES MARTIN SEGAL ALSO DO THE WORK FOR SOUTHERN CALIFORNIA CARPENTERS?

A YES, I DO IT.

(BRIEF PAUSE.)

Q BY MR. NELSON: WITH RESPECT TO THE OVERALL CONCEPT OF WITHDRAWAL LIABILITY AS IT APPLIES TO THIS PARTICULAR PLAN, I BELIEVE THERE'S A REFERENCE IN ONE [p. 267] OF THE DOCUMENTS IN JOINT EXHIBIT 7, I THINK IT WAS 7-D, THAT THERE HAD BEEN APPROXIMATELY 47 EMPLOYERS THAT HAD WITHDRAWN AS OF THE

DATE OF THAT REPORT. I'M SORRY, 43. I'M REFERRING YOU TO PAGE 9 OF THE REPORT, WHICH IS EXHIBIT -B – JOINT EXHIBIT 7-B. I GUESS FIRST LET ME DIRECT YOUR ATTENTION TO THAT EXHIBIT.

A YES.

Q THERE WERE ORIGINALLY 43 WITHDRAWING EMPLOYERS REFLECTED IN THE REPORT, OF WHOM SIX ELECTED TO RE-SIGN LABOR AGREEMENTS?

A THAT'S WHAT THIS FIRST PARAGRAPH SAYS.

Q AS I UNDERSTAND WHAT TRANSPIRED IN THOSE TRANSACTIONS IS THEY DECIDED, THOSE SIX WHO CAME BACK IN, DECIDED TO WITHDRAW, GOT THEIR WITHDRAWAL LIABILITY NOTICE AND DECIDED RE-SIGN LABOR AGREEMENTS, IS THAT YOUR UNDERSTANDING?

A YES. BY THE WAY, THIS JOINT EXHIBIT ONLY HAS ODD-NUMBERED PAGES. ALL THE EVEN-NUMBERED PAGES ARE MISSING.

MR. BEERS: HAS YOUR HONOR GOT BOTH SIDES?

THE ARBITRATOR: PAGE 8 IS MISSING.

MR. BEERS: YOUR HONOR, WHAT I'LL DO IS I'LL SWAP MY COPIES. THE PHOTOCOPY DEPARTMENT THAT COPIED THEM MUST HAVE COPIED DOUBLE-SIDED, ONLY ONE SIDE.

THE ARBITRATOR: GOES FROM 7, 9, 11.

[p. 268] MR. BEERS: I'LL MAKE SURE YOU GET BOTH SIDES OF THE PAGES. IN FACT, WHAT I'LL

DO, JUST TO MAKE SURE EVERYBODY GETS COPIES, I'LL TAKE THIS BACK TO MY OFFICE, GET A NEW JOINT EXHIBIT, AND DISTRIBUTE IT TO EVERYBODY.

THE ARBITRATOR: MR. BEERS, 10 IS MISSING, BECAUSE YOU LOOK AT PAGE 9 AT THE TOP OF THE PAGE –

MR. BEERS: I HAVE THE ORIGINALS THAT THE COPIES WERE MADE FROM, AND WHAT IT IS IS TWO-SIDED PAPER AND THE PHOTOCOPY DEPARTMENT JUST RAN IT THROUGH AS ONE SIDE.

THE WITNESS: SAME REMARK APPLIES TO EXHIBIT "E."

MR. BEERS: WE'LL HAVE THEM ALL.

THE WITNESS: SORRY.

MR. NELSON: WHERE WERE WE? OKAY.

Q FROM THAT PARTICULAR REFERENCE TO THE SIX EMPLOYERS WHO GOT THEIR WITHDRAWAL LIABILITY NOTICE AND ELECTED TO RE-SIGN LABOR AGREEMENTS, WE CAN CONCLUDE THAT THE WITHDRAWAL LIABILITY NOTICE PLAYED SOME ROLE IN THEIR DECISION TO RE-SIGN THE LABOR AGREEMENT?

A YOU MAY DRAW THAT CONCLUSION. I HAVE NO PARTICULAR KNOWLEDGE OF THEIR CIRCUMSTANCES.

Q WITH RESPECT TO THE NUMBER OF EMPLOYERS IN A MULTI-EMPLOYER PENSION BENEFIT PLAN WHICH HAS [p. 269] WITHDRAWAL LIABILITY, IS IT GENERALLY IN THE INTEREST OF EACH

EMPLOYER TO HAVE AS MANY EMPLOYERS IN THE PLAN AS POSSIBLE?

A GENERALLY IT'S FAVORABLE TO ONGOING EMPLOYERS TO HAVE OTHER EMPLOYERS IN THE PLAN IF THE PLAN HAS UNFUNDED VESTED BENEFITS, YES.

Q THE MORE EMPLOYERS THAT WERE PARTICIPATING IN THE PLANS, THE LOWER THE INDIVIDUAL WITHDRAWAL LIABILITY WOULD PRESUMABLY BE, ASSUMING THAT HOURS WORKED AND CONTRIBUTIONS WERE MADE PROPORTIONAL?

A WELL, I WOULD PUT IT THIS WAY: THE MORE EMPLOYERS THERE WERE, THE LARGER THE EMPLOYMENT BASE WOULD BE, THE MORE CONTRIBUTIONS WOULD BE RECEIVED BY THE PLAN, AND, THUS, THE SOONER THE SPECTER OF WITHDRAWAL LIABILITY WOULD BE REMOVED FROM THE PLAN, AS THEY WOULD PAY OFF THEIR WITHDRAWAL LIABILITIES.

Q YOU'RE BASED IN SOUTHERN CALIFORNIA?

A YES.

Q WITH RESPECT TO THE MULTI-EMPLOYER PENSION PLANS THAT YOU REPRESENT OR WORK WITH, HOW MANY OF THOSE HAVE WITHDRAWAL LIABILITY?

A TEN OR ELEVEN, AT LAST COUNT.

Q HOW MANY PLANS TOTAL DO YOU REPRESENT OR WORK WITH?

A EIGHTY MULTI-EMPLOYER PLANS.

Q AMONG THOSE 10 OR 11 THAT HAVE WITHDRAWAL [p. 270] LIABILITY, WOULD THOSE 10 OR 11 INCLUDE THE SOUTHERN CALIFORNIA CARPENTERS PLAN?

A YES.

Q DO YOU KNOW WHETHER THE NATIONAL BAKERY AND CONFECTIONARY WORKERS PLAN HAS WITHDRAWAL LIABILITY?

A I DON'T KNOW WHETHER IT DOES OR NOT. LET ME MAKE SURE I DIDN'T MISSTATE THE ANSWER TO A QUESTION. YOU ASKED ME A PARTICULAR QUESTION ABOUT SOUTHERN CALIFORNIA CARPENTERS. WHAT WAS THAT QUESTION? WAS THAT – THE QUESTION WAS, WAS IT AMONG THE TEN OR WAS IT AMONG THE 80?

Q AMONG THE TEN THAT HAVE WITHDRAWAL LIABILITY.

A I'M SORRY, I MISSPOKE IN THAT CASE. IT IS NOT. IT USED TO BE.

Q DID IT HAVE WITHDRAWAL LIABILITY IN 1980?

A YES.

Q THIS PARTICULAR PLAN HAD A BENEFIT INCREASE IN, I BELIEVE, MAY OF 1979? WELL, LET ME ASK YOU THE QUESTION. DID THIS PARTICULAR PLAN HAVE A BENEFIT INCREASE IN 1979?

A WE LIST IN THE APPENDIX TO EACH ANNUAL ACTUARIAL EVALUATION THE HISTORY OF THE BENEFIT LEVELS, AND I DON'T SEE ONE FOR MAY OF 1979.

Q WAS THERE ONE IN 1979? WAS THERE BENEFIT INCREASE IN 1979?

[p. 271] A NO. ACCORDING TO THIS DOCUMENT, WHICH WE PREPARED.

Q THERE WAS, HOWEVER, BENEFIT INCREASE IN 1980?

A CORRECT, JULY 1.

Q THAT BENEFIT INCREASE TOOK THE PENSION CREDIT FROM $3.40 AN HOUR – $3.40 A CREDIT TO $35.54 A CREDIT?

A FROM $32.40.

Q TO $35.64 A CREDIT?

A CORRECT. FOR THE VAST MAJORITY OF PEOPLE.

Q I TAKE IT THIS PARTICULAR PLAN HAD WITHDRAWAL LIABILITY BEFORE THAT BENEFIT INCREASE?

A NO, BECAUSE THE MEPA [SIC] HAD NOT BEEN PASSED. MEPA [SIC] WAS PASSED IN SEPTEMBER OF 1980.

Q DID THE PRESENT VALUE OF VESTED BENEFITS EXCEED THE VALUE OF ASSETS DURING 1979?

A YES.

Q WHAT IMPACT DID THE BENEFIT INCREASE HAVE UPON THAT PARTICULAR FUNDING SITUATION?

A IT RAISED THE AMOUNT OF UNFUNDED VESTED BENEFITS.

Q DO YOU KNOW BY WHAT PERCENTAGE?

A NO. I'M JUST ON THE SAME PAGE, I WOULD REMARK THAT THEY INCREASED THE CONTRIBUTION RATE BY 35 CENTS AN HOUR AT THE SAME TIME. IT NO DOUBT WAS A [p. 272] QUID PRO QUO IN THE BARGAIN.

Q DO YOU KNOW WHETHER THAT 35 CENT AN HOUR CONTRIBUTION INCREASE WOULD HAVE PAID FOR THE $3.24 PENSION CREDIT INCREASE?

A BASED ON THIS EXHIBIT "E," I THINK THE ANSWER IS YES. WHEREBY PAY FOR, YOU MEAN, PROVIDES FOR THE ADDITIONAL NORMAL COST PLUS AN AMORTIZATION PAYMENT FOR THE ADDITIONAL ACCRUED LIABILITY.

Q WHAT I'M ASKING IS, TO THE EXTENT THERE'S A GAP BETWEEN FUNDING AND BENEFITS, PRIOR TO THE BENEFIT INCREASE AND THE CONTRIBUTION INCREASE, DID THAT GAP WIDEN AFTER THE BENEFIT INCREASE AND THE CONTRIBUTION INCREASE?

A IT WIDENED ON THE DATE THAT THE BENEFITS WERE INCREASED. IT WIDENED ON JULY 1ST OF 1980.

Q BUT YOU CAN'T EXPRESS AS A PERCENTAGE ESTIMATE HOW MUCH THAT GAP INCREASED?

A GIVEN SOME TIME I COULD COME UP WITH SOMETHING. IT WAS A TEN PERCENT INCREASE IN BENEFITS FOR THE VAST MAJORITY OF SERVICE, SO THE PRESENT VALUE OF VESTED BENEFITS WOULD INCREASE APPROXIMATELY TEN PERCENT. THE ASSETS ON THAT DAY WOULD NOT INCREASE AT ALL, SO THE UNFUNDED, WHICH IS A DIFFERENCE BETWEEN THE LIABILITY AND THE ASSETS, WOULD INCREASE BY MORE THAN TEN PERCENT.

(BRIEF PAUSE.)

[p. 273] MR. NELSON: I HAVE NOTHING FURTHER.

MR. BEERS: NO FURTHER QUESTIONS.

THE ARBITRATOR: YOU HAVE SOME QUESTIONS?

MR. BEERS: NO, NO QUESTIONS.

THE ARBITRATOR: THANK YOU VERY MUCH. YOU'RE EXCUSED.

ANY FURTHER WITNESSES, MR. BEERS?

MR. BEERS: NO.

THE ARBITRATOR: OFF THE RECORD FOR A MOMENT.

* * *

(Jurat Omitted In Printing)

Exhibit 15

BUCK CONSULTANTS GM 87-70

Employee Benefit and Welfare Plans
General

Date: December 14, 1987

TO: DISTRIBUTION LISTS 1-5

FROM: R. C. MURPHY

RE: 1. BUCK FORWARD INTEREST RATE INDEX – INTEREST RATE EQUIVALENT TO THE FORWARD RATES IN THE U.S. GOVERNMENT BOND MARKET – 1/1/79 – 12/1/87

2. INTEREST RATE EQUIVALENT TO THE PBGC PLAN TERMINATION ANNUITY RATES – 6/1/78 – 12/31/87

Table 1 gives the interest rate which is equivalent to the forward rates in the U.S. Government bond market.

Table 2 gives the interest rate which is equivalent to the PBGC plan termination annuity rates.

RCM:AC

(Please store in Volume 3 of the GM – Orange Notebook in Section 18. Key Indicators and Subsection B. Please destroy Bulletin GM 87- 45.)

TABLE 1

BUCK FORWARD INTEREST RATE INDEX –
INTEREST RATE EQUIVALENT TO
THE FORWARD RATES IN THE U.S. GOVERNMENT BOND MARKET*

Date	Equivalent Rate for			Forward Rate in Year				
	Composite**	Retireds***	Actives****	1	5	10	15	20
1-1-79	9.1%	9.3%	9.0%	10.8%	9.1%	9.1%	8.9%	8.4%
2-1-79	9.1	9.2	9.0	10.4	9.0	9.0	8.9	8.6
3-1-79	9.3	9.5	9.2	10.6	9.3	9.3	9.2	8.8
4-1-79	9.3	9.4	9.2	10.3	9.1	9.2	9.1	8.8
5-1-79	9.6	9.7	9.5	10.7	9.5	9.4	9.2	9.2
6-1-79	9.3	9.4	9.3	10.2	9.0	9.5	9.6	8.7
7-1-79	9.0	9.0	9.0	9.5	8.8	9.4	9.3	8.4
8-1-79	9.2	9.3	9.2	10.0	9.1	9.3	9.3	8.8
9-1-79	9.3	9.5	9.2	10.9	9.2	9.2	9.2	8.6
10-1-79	9.5	9.7	9.3	11.2	9.3	9.7	9.3	7.9
11-1-79	10.6	11.1	10.2	13.4	10.4	10.5	10.1	8.5
12-1-79	10.5	10.8	10.2	12.4	10.6	10.6	9.8	8.8
1-1-80	10.3	10.7	10.2	12.2	10.1	10.8	10.3	8.4
2-1-80	11.5	11.7	11.4	12.8	11.5	11.8	11.1	10.6

Date	Equivalent Rate for			Forward Rate in Year				
	Composite**	Retireds***	Actives****	1	5	10	15	20
3-1-80	13.1	13.7	12.5	16.9	12.1	12.6	11.8	10.6
4-1-80	12.9	13.4	12.4	16.9	12.0	13.3	13.4	8.6
5-1-80	11.3	11.3	11.3	11.6	11.2	11.9	11.6	10.8
6-1-80	10.8	10.6	11.0	9.2	11.2	11.5	11.5	10.6
7-1-80	10.5	10.4	10.6	8.9	10.8	11.3	11.1	9.4
8-1-80	11.2	11.1	11.4	9.8	11.3	12.1	12.3	10.3
9-1-80	11.9	12.1	11.7	12.0	12.6	11.7	12.6	9.3
10-1-80	12.4	12.5	12.4	12.9	11.9	13.0	12.8	10.9
11-1-80	12.8	13.1	12.5	14.4	12.8	12.6	12.8	10.5
12-1-80	12.8	13.2	12.3	15.7	12.2	12.6	12.6	9.7
1-1-81	12.4	12.8	12.0	14.3	12.4	12.6	12.0	9.3
2-1-81	12.7	13.1	12.3	14.8	12.7	12.9	12.5	9.2
3-1-81	13.4	14.0	12.8	15.2	13.8	13.3	12.5	9.5
4-1-81	13.3	13.7	12.8	13.9	13.6	13.4	12.3	10.3
5-1-81	14.2	14.8	13.6	16.3	14.5	14.0	13.0	10.6
6-1-81	13.5	14.1	12.9	15.9	13.3	13.5	12.9	9.2
7-1-81	13.9	14.5	13.3	15.7	14.1	13.8	12.9	9.9
8-1-81	14.6	15.4	13.8	17.5	14.7	14.7	13.0	9.5
9-1-81	15.4	16.3	14.5	18.3	15.9	15.5	14.2	9.3
10-1-81	16.0	16.6	15.3	17.8	15.5	18.1	16.0	9.1

Date	Equivalent Rate for			Forward Rate in Year				
	Composite**	Retireds***	Actives****	1	5	10	15	20
11-1-81	15.0	15.4	14.5	15.4	15.3	15.8	14.8	9.7
12-1-81	13.5	13.6	13.3	12.4	13.9	13.7	13.5	11.0
1/1/82	14.4	14.6	14.1	14.2	14.5	14.3	14.6	10.6
2/1/82	14.6	14.9	14.2	14.9	14.5	15.2	14.7	10.0
3/1/82	14.4	14.7	14.0	15.0	14.1	15.1	14.3	10.2
4/1/82	14.4	14.8	13.9	15.1	14.6	13.8	13.9	11.2
5/1/82	14.0	14.4	13.6	14.5	13.9	13.5	13.6	10.9
6/1/82	14.0	14.3	13.7	13.8	14.3	13.7	14.0	10.8
7/1/82	14.7	15.1	14.3	15.3	15.0	13.8	15.0	11.0
8/1/82	14.0	14.2	13.8	13.5	13.9	13.6	14.7	10.7
9/1/82	13.1	13.2	13.0	11.9	13.3	12.3	13.4	11.6
10/1/82	12.3	12.4	12.1	10.9	12.2	11.7	12.5	10.7
11/1/82	11.5	11.4	11.6	9.9	11.4	10.3	12.6	10.7
12/1/82	11.7	11.5	11.8	9.8	11.2	10.7	12.5	11.7
1/1/83	11.3	11.1	11.5	9.3	11.3	10.7	12.5	11.4
2/1/83	11.9	11.5	12.2	9.5	11.6	11.2	13.2	12.9
3/1/83	11.3	10.9	11.6	9.1	10.7	9.8	13.5	12.1
4/1/83	11.4	11.2	11.6	9.9	11.5	11.1	12.7	11.8
5/1/83	11.0	10.8	11.2	8.9	11.2	10.5	12.2	11.1
6/1/83	11.7	11.4	11.9	10.0	12.0	11.5	12.8	12.2

Date	Equivalent Rate for			Forward Rate in Year				
	Composite**	Retireds***	Actives****	1	5	10	15	20
7/1/83	11.7	11.6	11.8	10.1	12.1	11.8	12.4	11.5
8/1/83	12.5	12.4	12.6	10.9	12.7	13.0	12.8	11.8
9/1/83	12.7	12.5	12.8	10.9	13.6	12.4	13.3	12.4
10/1/83	12.0	11.9	12.1	10.2	12.8	12.1	12.8	11.4
11/1/83	12.4	12.2	12.5	10.1	12.8	12.2	13.1	12.2
12/1/83	12.2	12.0	12.3	10.3	12.6	12.1	12.9	11.7
1/1/84	12.3	12.2	12.4	10.5	12.9	12.2	12.9	11.7
2/1/84	12.2	12.0	12.4	10.2	12.7	12.1	12.8	12.2
3/1/84	12.6	12.4	12.8	10.6	13.1	12.3	13.1	13.0
4/1/84	13.0	12.9	13.1	11.4	13.8	12.9	13.1	13.1
5/1/84	13.3	13.2	13.4	11.5	14.1	13.1	13.5	13.2
6/1/84	14.4	14.4	14.3	12.8	15.2	14.2	13.9	13.8
7/1/84	14.3	14.3	14.2	12.9	14.7	14.1	13.8	13.9
8/1/84	13.4	13.4	13.3	12.5	13.8	13.6	13.3	12.3
9/1/84	13.1	13.2	13.0	12.5	13.6	13.3	12.5	12.5
10/1/84	12.8	12.9	12.7	12.0	13.4	12.7	12.6	12.1
11/1/84	12.1	12.1	12.1	10.8	12.7	12.2	12.1	11.5
12/1/84	12.1	12.0	12.2	10.0	13.0	12.2	12.6	11.4
1/1/85	12.1	11.9	12.2	9.7	13.3	12.3	12.6	11.2
2/1/85	11.7	11.5	11.8	9.4	12.5	12.2	12.3	10.8

Date	Equivalent Rate for			Forward Rate in Year				
	Composite**	Retireds***	Actives****	1	5	10	15	20
3/1/85	12.4	12.3	12.6	10.2	13.3	12.8	13.3	11.6
4/1/85	12.3	12.1	12.4	10.0	12.9	12.5	13.2	11.6
5/1/85	12.2	11.8	12.5	9.5	12.7	12.0	13.3	12.8
6/1/85	11.1	10.7	11.4	8.4	11.8	11.4	12.5	11.9
7/1/85	11.0	10.6	11.3	8.1	11.4	11.5	12.0	11.6
8/1/85	11.4	11.0	11.7	8.7	12.1	11.9	12.4	11.7
9/1/85	11.1	10.7	11.5	8.4	11.8	11.6	12.6	11.4
10/1/85	11.3	10.8	11.7	8.5	11.6	12.0	12.9	11.8
11/1/85	10.9	10.5	11.3	8.4	11.2	11.6	12.4	11.4
12/1/85	10.4	10.0	10.8	8.3	10.7	10.9	11.9	11.1
1/1/86	9.9	9.4	10.3	7.9	9.8	10.4	11.8	10.8
2/1/86	9.9	9.5	10.3	7.9	9.9	10.6	11.4	10.6
3/1/86	8.8	8.5	9.0	7.7	8.7	8.9	9.7	9.4
4/1/86	7.8	7.7	8.0	7.0	7.8	7.9	7.8	8.7
5/1/86	7.9	7.8	8.0	6.8	7.8	8.3	8.5	9.5
6/1/86	8.6	8.5	8.7	7.2	7.8	9.7	8.8	10.6
7/1/86	8.1	7.9	8.2	6.7	8.1	8.7	9.5	8.2
8/1/86	8.2	7.9	8.4	6.5	8.1	9.2	10.8	8.6
9/1/86	7.7	7.5	7.9	5.6	7.9	8.8	10.0	8.2
10/1/86	8.2	8.0	8.3	6.0	8.5	9.5	10.6	9.0

Date	Equivalent Rate for			Forward Rate in Year				
	Composite**	Retireds***	Actives****	1	5	10	15	20
11/1/86	8.0	7.8	8.2	5.9	8.3	9.2	10.2	9.1
12/1/86	7.8	7.6	7.9	5.9	8.1	8.8	10.3	8.8
1/1/87	7.9	7.7	8.1	6.3	7.1	9.5	7.2	12.6
2/1/87	7.8	7.6	7.9	6.1	7.6	8.8	7.7	12.0
3/1/87	7.7	7.5	7.9	6.2	7.6	8.1	9.6	8.8
4/1/87	8.0	7.8	8.2	6.4	7.9	8.5	9.5	9.1
5/1/87	8.7	8.5	8.9	7.2	8.7	9.1	10.1	9.1
6/1/87	8.9	8.8	9.0	7.4	8.9	9.4	9.9	9.3
7/1/87	8.8	8.7	9.0	7.2	9.1	9.3	10.0	9.3
8/1/87	9.2	9.0	9.4	7.3	9.4	10.1	10.1	9.3
9/1/87	9.4	9.3	9.6	7.7	8.5	9.0	9.3	9.4
10/1/87	10.1	9.9	10.3	8.3	10.3	10.5	11.4	10.3
11/1/87	9.3	9.2	9.5	7.5	9.7	9.6	10.8	10.0
12/1/87	9.4	9.2	9.5	7.5	9.8	9.8	10.9	9.5

*Treasury bills, notes and bonds.

**Mean of rate for retired and active

***For average age (weighted by liability)of 69.

****For average age (weighted by liability) of 50 with an average retirement age of 63.

TABLE 2

INTEREST RATE EQUIVALENT TO
THE PBGC PLAN TERMINATION ANNUITY RATES

Period	Equivalent Rate for		
	Composite*	Retireds**	Actives***
6-1-78 to 2-28-79	6.9%	7.25%	6.5%
3-1-79 to 8-31-79	7.1	7.50	6.8
9-1-79 to 11-30-79	7.4	7.75	7.1
12-1-79 to 2-29-80	8.1	8.50	7.6
3-1-80 to 8-31-80	8.4	8.75	8.1
9-1-80 to 11-30-80	8.6	9.00	8.3
12-1-80 to 12-31-80	8.9	9.25	8.6
1-1-81 to 1-31-81	9.1	9.50	8.8
2-1-81 to 3-31-81	9.4	9.75	9.1
4-1-81 to 5-31-81	9.6	10.00	9.3
6-1-81 to 6-30-81	9.9	10.25	9.6
7-1-81 to 7-31-81	10.1	10.50	9.8
8-1-81 to 9-30-81	9.9	10.25	9.6
10-1-81 to 10-31-81	10.1	10.50	9.8

Period	Equivalent Rate for		
	Composite*	Retireds**	Actives***
11-1-81 to 11-30-81	10.4	10.75	10.1
12-1-81 to 12-31-81	10.6	11.00	10.3
1-1-82 to 1-31-82	10.1	10.50	9.8
2-1-82 to 2-28-82	10.4	10.75	10.1
3-1-82 to 5-31-82	10.6	11.00	10.3
6-1-82 to 7-31-82	10.4	10.75	10.1
8-1-82 to 9-30-82	10.6	11.00	10.3
10-1-82 to 10-31-82	10.4	10.75	10.1
11-1-82 to 11-30-82	10.1	10.50	9.8
12-1-82 to 12-31-82	9.9	10.25	9.6
1-1-83 to 1-31-83	9.6	10.00	9.3
2-1-83 to 3-31-83	9.4	9.75	9.1
4-1-83 to 5-31-83	9.1	9.50	8.8
6-1-83 to 8-31-83	8.9	9.25	8.6
9-1-83 to 1-31-84	9.1	9.50	8.8
2-1-84 to 2-29-84	9.4	9.75	9.1
3-1-84 to 3-31-84	9.1	9.50	8.8
4-1-84 to 4-30-84	9.4	9.75	9.1
5-1-84 to 6-30-84	9.6	10.00	9.3

Period	Equivalent Rate for		
	Composite*	Retireds**	Actives***
7-1-84 to 7-31-84	10.1	10.50	9.8
8-1-84 to 8-31-84	10.4	10.75	10.1
9-1-84 to 10-31-84	10.1	10.50	9.8
11-1-84 to 11-30-84	9.9	10.25	9.6
12-1-84 to 12-31-84	9.6	10.00	9.3
1-1-85 to 2-28-85	9.4	9.75	9.1
3-1-85 to 3-31-85	9.1	9.50	8.8
4-1-85 to 4-30-85	9.4	9.75	9.1
5-1-85 to 5-31-85	9.6	10.00	9.3
6-1-85 to 6-30-85	9.4	9.75	9.1
7-1-85 to 9-30-85	8.9	9.25	8.6
10-1-85 to 12-31-85	8.6	9.00	8.3
1-1-86 to 1-31-86	8.4	8.75	8.1
2-1-86 to 3-31-86	8.1	8.50	7.8
4-1-86 to 4-30-86	7.6	8.00	7.3
5-1-86 to 9-30-86	7.4	7.75	7.1
10-1-86 to 10-31-86	7.1	7.50	6.8
11-1-86 to 11-30-86	7.4	7.75	7.1
12-1-86 to 2-28-87	7.1	7.50	6.8

Period	Equivalent Rate for Composite*	Retireds**	Actives***
3-1-87 to 5-31-87	6.9	7.25	6.6
6-1-87 to 6-30-87	7.1	7.50	6.8
7-1-87 to 9-30-87	7.4	7.75	7.1
10-1-87 to 10-31-87	7.6	8.00	7.3
11-1-87 to 12-31-87	7.9	8.25	7.6

*Mean of rate for retired and active.
**Actual rate.
***for average age (weighted by liability) of 50 with an average retirement age 63.

Exhibit 16A

INTEREST BASIS: Buck Forward Interest Rates

CONTRIBUTION BASIS: Includes CEN-VI-RO Contributions

WORKSHEET FOR ESTIMATING
WITHDRAWAL LIABILITY FROM THE
SOUTHERN CALIFORNIA LABORERS PENSION TRUST
DURING YEAR ENDED DECEMBER 31, 1981

1. What were your company's contributions to the Pension Fund during the five years ending:

   a. December 31, 1979 $146,699.67
   b. December 31, 1980 $118,520.96

2. The aggregate Pension Fund contributions on behalf of continuing employers during these five years were as follows:

   a. December 31, 1979 $273,549,700
   b. December 31, 1980 $320,467,000

3. Percent of total Pension Fund contributions for which you were obligated:

   a. Divide 1a by 2a .000536282
   b. Divide 1b by 2b .000369838

4. The Pension Fund's aggregate unfunded vested liability pools as of December 31, 1980 are as follows:

   a. Pool as of December 31, 1979 $288,786,182
   b. Pool as of December 31, 1980 $(43,622,922)

5. Your estimated withdrawal assessment before the offset is determined as follows:

   a. Line 3a multiplied by line 4a $154,870.83
   b. Line 3b multiplied by line 5b [sic] $(16,133.41)

   c. Total of a and b $138,737.42

6. Offset amount:

   - If line 5c is less than $100,000, then the offset amount equals $50,000.

   - If line 5c is greater than $150,000, then the offset amount equals $0.

   - If line 5c exceeds $100,000 but is less than $150,000, then the offset amount equals $50,000 minus the amount by which line 5c exceeds $100,000; for example, if line 5c equals $130,000, then the offset amount equals $20,000. $11,262.58

7. Your estimated withdrawal assessment equals line 5c less line 6: $127,474.84

Exhibit 16B

INTEREST BASIS: Buck Forward Interest Rates

CONTRIBUTION BASIS: Excludes CEN-VI-RO Contributions

WORKSHEET FOR ESTIMATING
WITHDRAWAL LIABILITY FROM THE
SOUTHERN CALIFORNIA LABORERS PENSION TRUST
DURING YEAR ENDED DECEMBER 31, 1981

1. What were your company's contributions to the Pension Fund during the five years ending:

   a. December 31, 1979 $102,656.68
   b. December 31, 1980 $102,705.28

2. The aggregate Pension Fund contributions on behalf of continuing employers during these five years were as follows:

   a. December 31, 1979 $273,549,700
   b. December 31, 1980 $320,467,000

3. Percent of total Pension Fund contributions for which you were obligated:

   a. Divide 1a by 2a .000375276
   b. Divide 1b by 2b .000320486

4. The Pension Fund's aggregate unfunded vested liability pools as of December 31, 1980 are as follows:

   a. Pool as of December 31, 1979 $288,786,182
   b. Pool as of December 31, 1980 $(43,622,922)

5. Your estimated withdrawal assessment before the offset is determined as follows:

   a. Line 3a multiplied by line 4a $108,375.52
   b. Line 3b multiplied by line 5b [sic] $(13,980.54)

   c. Total of a and b $94,394.98

6. Offset amount:

   - If line 5c is less than $100,000, then the offset amount equals $50,000. $50,000

   - If line 5c is greater than $150,000, then the offset amount equals $0.

   - If line 5c exceeds $100,000 but is less than $150,000, then the offset amount equals $50,000 minus the amount by which line 5c exceeds $100,000; for example, if line 5c

equals $130,000, then the offset amount equals $20,000.

7. Your estimated withdrawal assessment equals line 5c less line 6: $44,394.98

Exhibit 16C

INTEREST BASIS: PBGC Rates

CONTRIBUTION BASIS: Includes CEN-VI-RO Contributions

WORKSHEET FOR ESTIMATING
WITHDRAWAL LIABILITY FROM THE
SOUTHERN CALIFORNIA LABORERS PENSION TRUST
DURING YEAR ENDED DECEMBER 31, 1981

1. What were your company's contributions to the Pension Fund during the five years ending:

   a. December 31, 1979 $146,699.67
   b. December 31, 1980 $118,520.96

2. The aggregate Pension Fund contributions on behalf of continuing employers during these five years were as follows:

   a. December 31, 1979 $273,549,700
   b. December 31, 1980 $320,467,000

3. Percent of total Pension Fund contributions for which you were obligated:

   a. Divide 1a by 2a .000536282
   b. Divide 1b by 2b .000369838

4. The Pension Fund's aggregate unfunded vested liability pools as of December 31, 1980 are as follows:

   a. Pool as of December 31, 1979 $382,254,700
   b. Pool as of December 31, 1980 $12,502,600

5. Your estimated withdrawal assessment before the offset is determined as follows:

   a. Line 3a multiplied by line 4a $204,996.32
   b. Line 3b multiplied by line 5b [sic] $4,623.94

   c. Total of a and b $209,620.26

6. Offset amount:

   - If line 5c is less than $100,000, then the offset amount equals $50,000.

   - If line 5c is greater than $150,000, then the offset amount equals $0.

   - If line 5c exceeds $100,000 but is less than $150,000, then the offset amount equals $50,000 minus the amount by which line 5c exceeds $100,000; for example, if line 5c equals $130,000, then the offset amount equals $20,000.

7. Your estimated withdrawal assessment equals line 5c less line 6: $209,620.26

Exhibit 16D

INTEREST BASIS: PBGC Rates

CONTRIBUTION BASIS: Excludes CEN-VI-RO Contributions

WORKSHEET FOR ESTIMATING
WITHDRAWAL LIABILITY FROM THE
SOUTHERN CALIFORNIA LABORERS PENSION TRUST
DURING YEAR ENDED DECEMBER 31, 1981

1. What were your company's contributions to the Pension Fund during the five years ending:

   a. December 31, 1979 $102,656.68
   b. December 31, 1980 $102,705.28

2. The aggregate Pension Fund contributions on behalf of continuing employers during these five years were as follows:

   a. December 31, 1979 $273,549,700
   b. December 31, 1980 $320,467,000

3. Percent of total Pension Fund contributions for which you were obligated:

   a. Divide 1a by 2a .000375276
   b. Divide 1b by 2b .000320486

4. The Pension Fund's aggregate unfunded vested liability pools as of December 31, 1980 are as follows:

   a. Pool as of December 31, 1979 $382,254,700
   b. Pool as of December 31, 1980 $12,502,600

5. Your estimated withdrawal assessment before the offset is determined as follows:

   a. Line 3a multiplied by line 4a $143,451.01
   b. Line 3b multiplied by line 5b [sic] $4,006.91

   c. Total of a and b $147,457.92

6. Offset amount: 2,542.08

   - If line 5c is less than $100,000, then the offset amount equals $50,000.
   - If line 5c is greater than $150,000, then the offset amount equals $0.
   - If line 5c exceeds $100,000 but is less than $150,000, then the offset amount equals $50,000 minus the amount by which line 5c exceeds $100,000; for example, if line 5c equals $130,000, then the offset amount equals $20,000.

7. Your estimated withdrawal assessment equals line 5c less line 6: $144,915.84

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration	)	
	)	No.
Between	)	72-621-0001-87
CONSTRUCTION LABORERS	)	MEPPA [sic]
PENSION TRUST FOR	)	
SOUTHERN CALIFORNIA	)	
	)	
and	)	
	)	
CONCRETE PIPE AND	)	
PRODUCTS COMPANY OF	)	
CALIFORNIA	)	
	)	

DECISION AND AWARD

of

KENNETH M. SCHWARTZ
Arbitrator

Dated: August 16, 1988

Introduction

This is the second phase of a bifurcated arbitration proceeding between Construction Laborers Pension Trust Fund for Southern California ("Trust") and Concrete Pipe and Products Company of California ("Concrete Pipe"). This proceeding was conducted pursuant to an order of the United States District Court for the Central District of California and was in accord with Section 4221 of the Multi-Employer Pension Plan Amendments Act of 1980

(MEPPA) [sic]. The hearing was held in Los Angeles, California, in the offices and under the auspices of the American Arbitration Association on February 18, 1988.

Counsel appearing for the Trust were Cox, Castle & Nicholson, by Everett G. Beers, Esq.

Counsel appearing for Concrete Pipe were Diepenbrock, Wulff, Plant & Hannegan, by James M. Nelson, Esq.

The dispute between the parties arose out of the attempts of the Trust to seek an award upholding its assessment of withdrawal liability on Concrete Pipe in the principal amount of $268,168.81.

The first phase of the arbitration hearing was held in Los Angeles, California, on June 25, 1987. As a result of said hearing, this Arbitrator issued his Award on August 27, 1987, at which time he concluded that the withdrawal of Concrete Pipe was covered by MEPPA [sic] and that Concrete Pipe would be liable for payment of its share of unfunded vested liability of the Trust Pension Plan when it withdrew from the Plan in 1981.

In this second phase of this proceeding, the issue to be resolved by the Arbitrator is the amount of withdrawal liability due the Trust based upon the applicable law.

I

Facts Pertinent to Resolution of the Amount of Withdrawal Liability

The parties to this proceeding had entered into a stipulation of facts in the District Court proceeding

docketed as *Construction Laborers Pension Trust For Southern California v. Concrete Pipe of California*, Case No. CV 82-5184.

For purposes of convenience, the relevant paragraphs of said stipulation are summarized and set forth below:

Concrete Pipe is a California corporation doing business within the Central District of California; the Trust is an expressed Trust organized under the Labor-Management Relations Act of 1947, as amended; that said Trust is an express Trust formed under a Trust Agreement entered into among the Southern California District Council of Laborers ("Union") and several multi-Employer associations; that said Trust primarily covers employees in the building and construction industry and is managed by a Board of Trustees, half of whom are selected by the Union and the other half selected by the multi-Employer associations.

The Trust derives revenues from Employer contributions made by Employers bound to Collective Bargaining Agreements with the Union; these Collective Bargaining Agreements require signatory Employers to make contributions to the Trust for each hour worked by employees within the bargaining units covered by the Collective Bargaining Agreements involved.

Cen-Vi-Ro and the Union (as well as the affiliated Local 220 located in Bakersfield) were signatories to such a Collective Bargaining Agreement prior to November 30, 1976, covering terms and conditions of work (including Trust coverage) of employees represented by Local 220 at the Shafter Plant.

On and before November 30, 1976, a plant for the manufacture of concrete pipe located at Shafter, California, was owned by Cen-Vi-Ro and as of December 1, 1976, this plant became owned by Concrete Pipe and has been owned by it at all times since that date.

On December 1, 1976, and thereafter, Concrete Pipe honored the terms of the Collective Bargaining Agreement between Cen-Vi-Ro and the Union which expired in 1978. On November 27, 1978, Concrete Pipe entered into a new Collective Bargaining Agreement with the Union which likewise provided for contributions to the Trust for each hour worked by employees within the bargaining unit covered by the Collective Bargaining Agreement. This Agreement contained provisions in respect to the appropriate notices to be given by the parties to each other in respect to terminating the Agreement.

Pursuant to the Trust Fund contribution provisions of the new Agreement signed by the Union and Concrete Pipe on November 27, 1978, and the Trust Fund contributing provisions of the Agreement between Cen-Vi-Ro and the Union that Concrete Pipe had honored since December 1, 1976, Concrete Pipe had paid the Trust $102,656.68.

On April 21, 1981, the Union sent the appropriate notice of reopening of the Labor Agreement for negotiations, as did Concrete Pipe likewise on May 1, 1981.

For reasons not material to this phase of the proceedings, negotiations broke down resulting in an impasse between the parties.

On August 17, 1979, Concrete Pipe ceased production at the Shafter Plant.

For hours worked in May 1980, Concrete Pipe contributed $48.60 to the Trust. That was the last contribution of Concrete Pipe to the Trust.

On January 20, 1982, the Trust notified Concrete Pipe of its alleged withdrawal liability of $268,168.81 and demanded payment with a prescribed schedule.

Concrete Pipe has not made any payment on the alleged withdrawal.

Concrete Pipe has not been financially incapable of paying any scheduled benefit to any of its beneficiaries.

The Trust has been informed by its independent actuary, The Martin E. Segal Company, Inc., that as of December 31, 1981, it had an aggregate unfunded vested liability of *$532,621,400;* that as of December 31, 1980, it had an unfunded vested liability of *$514,181,200;* and that as of December 31, 1979, it had an unfunded vested liability of *$493,322,600.* (The stipulation shows as of December 31, 1979, an aggregate unfunded vested liability in the amount of *$532,621,400,* whereas Exhibit "F" to the stipulation, entitled "Report on Employer Withdrawal Liability," shows in Section II, entitled "The Plan's Withdrawal Liability Pools," the amount as of December 31, 1979, to be *$493,392,600.*) (Emphasis mine)

No shareholder, officer, director, agent or representative of Concrete Pipe has, during the period from 1976 to the present date, had any participation in:

(a) the investment decisions pertaining to the assets of the Trust;

(b) the decisions of the Trust to adjust Pension Benefit levels;

(c) the decisions affecting the Trust's administrative costs; or

(d) the selection of actuarial assumptions or methods upon which Concrete Pipe's asserted withdrawal liability has been calculated.

The Trust's decisions are made by the Trustees. At no time did Concrete Pipe choose to apply for membership or belong to any of the multi-Employer Associations who select one-half of the Trustees on the Board of Trustees, nor had Concrete Pipe ever been denied membership in said Associations.

II

Contentions of the Parties

A. Concrete Pipe contends that:

1. The actuarial assumptions and methods used in computing its withdrawal liability were not reasonable in the aggregate; moreover, the computations contained significant errors in the application of the actuarial assumption used, such as:

(a) accrual of contributions from other Employers in assessing Concrete Pipe's withdrawal liability;

(b) incorrect application of Trust's own actuarial standards in computing the withdrawal liability; and

(c) use of actuarial assumptions which are unreasonable when considered individually and result in the over-all actuarial assumptions and methods being unreasonable in the aggregate.

2. Presumption contained in 29 U.S.C. Section 1401 that the decisions by the Trust and the Trust Fund's actuary are presumed correct result in an unconstitutional deprivation of due process. Further, that the preponderance of the evidence establishes that the withdrawal liability determination is clearly erroneous.

3. There are reasonable actuarial assumptions which can be applied to this case which would result in reducing the withdrawal liability to $41,523.15.

B. The Trust contends that:

1. The two-tiered Segal method of calculating the Trust's unfunded vested liability was based in the aggregate, on reasonable actuarial assumptions, and therefore the Trust's determination of the amount of withdrawal liability should be upheld.

2. The Trust's actuarial assumptions made in accounting for unrecorded past service credit were reasonable, having been based on an objective and statistically significant survey.

3. Requiring a withdrawing Employer to pay the same share of the Plan's unfunded vested liability (exclusive of interest) regardless of whether it pays in a lump sum or in installments is reasonable.

4. The presumption in favor of the Trust that requires a withdrawing Employer to carry

the burden of proof that Trust's determinations are unreasonable is simply a constitutional allocation of burden of proof to Employer in withdrawal liability cases; hence, in order to defeat Trust's calculations, Concrete Pipe has burden of showing that the determination was "unreasonable or clearly erroneous."

5. When Concrete Pipe purchased Cen-Vi-Ro and continued its obligation to contribute to the Trust, Concrete Pipe inherited Cen-Vi-Ro's contribution history; hence, is liable for the full share of withdrawal liability, plus accrued interest.

III

Analysis, Discussion and Conclusions

A. Constitutionality of 29 U.S.C. § 1401(a)(3)(A).

Concrete Pipe has raised the question of the constitutionality of the presumption in 29 U.S.C. Section 1401(a)(3)(A). The argument made is that the section is void because it "unconstitutionally" violates Concrete Pipe and Products' right to an impartial decisionmaker, and, hence, its right to procedural due process of law.

While the arguments made by counsel for Concrete Pipe are thought provoking, nonetheless, this Arbitrator shares the view of counsel for the Trust as to what the Arbitrator's role is in this proceeding. It is clear that the question of constitutionality of statutory provisions should be adjudicated in court proceedings. As pointed out by the court in *Republic Industries v. Central*

Pennsylvania Teamsters Pension Fund, 693 F.2d 290, 296 (3rd Cir. 1982):

> "[T]he legislature could not have intended to defeat separation of powers principles by allowing an administrative tribunal to review the constitutional validity of a statute – a function reserved for the judiciary. It would be unconstitutional, therefore, to compel the arbitrator to review the facial constitutionality of MPPA [sic]."

It should be noted that the matter of the constjtutionality of the statutory provision of ERISA presumption was upheld by the Ninth Circuit Court of Appeals in the case of *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials*, 749 F.2d 1396; *cert. denied*, 471 U.S. 1054. It is recognized that the Third Circuit in the case of *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, held the presumption of correctness to be unconstitutional. Notwithstanding the *Yahn* case, the law in California, being in the Ninth Circuit, is as stated in the *Thompson* case, *supra*, decision, namely, that the provisions of Section 1401 are constitutional.

This Arbitrator is fully in accord with the decision of the court in the *Republic Industries* case, *supra*; hence, believes that the issue of constitutionality of the statute is for the Federal Courts and not the Arbitrator.

B. Whether Concrete Pipe When it Purchased Cen-Vi-Ro's Business and Continued Cen-Vi-Ro's Obligation to Continue to the Trust, Inherited Cen-Vi-Ro's Contribution History and, Hence, Became Liable for its Full Share of Withdrawal Liability of $268,168.61, Plus Accrued Interest.

The Trust contends that Concrete Pipe inherited the contribution history for 1976, the year in which it purchased Cen-Vi-Ro and is, therefore, liable for its full share of withdrawal liability as indicated herein. The Trust relies upon the express words found in the statute in Section 1384(b) in support for its position. Said Section provides:

> "[T]he liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years."

The argument by the Trust is that, in the instant case, Concrete Pipe inherited the contribution history for 1976, the year in which the purchase took place.

Furthermore, the Trust argues, even if the express words of MEPPA [sic] did not so provide, Concrete Pipe would nevertheless be liable under the labor law "successorship doctrine."

The reliance of the Trust on Section 1384, in the opinion of the Arbitrator, is misplaced.

The provisions of MEPPA [sic] as they relate to withdrawal liability of employers withdrawing from multi-employer pension plans is applicable to all employers

withdrawing from such plans on or after September 26, 1980. Under the provisions of the Act, the employer who withdraws from the plan is liable to the plan for the employer's allocable share of the plan's unfunded vested benefits. The unfunded vested benefits are defined as the difference between the assets of the trust and the current discounted value of all vested benefits eventually to be paid participants.

The Purchase and Sale Agreement between Cen-Vi-Ro and Concrete Pipe negotiated in 1976 is obviously not in compliance with the provisions of 29 U.S.C. Section 1384, for purposes of shifting the liability from the seller to the purchaser. The Purchase Agreement having been entered more than four (4) years prior to the enactment of the statute, there was no way for the parties to anticipate the statutory provisions. The Purchase and Sale Agreement did not provide for or require the purchaser to contribute to the Trust; nor did it compel the purchaser to post a bond or ensure that Cen-Vi-Ro was secondarily liable for withdrawal liability in the event Concrete Pipe withdraws as is provided for in 29 U.S.C. Section 1384.

Concrete Pipe's contention that Congress provided by statute in Section 1384 an exclusive mechanism for shifting liability as described herein has much merit.

In *Continental Inc. and Bakery Workers Pension Fund*, 5 EBC 1326, at 1336, Arbitrator Mittelman concluded that silence of the statute with respect to the pre-MEPPA [sic] sales of assets "is not an invitation to arbitral and judicial creativity" and that it must be regarded as "evidence of congressional intent to preclude its application." It is a conclusion with which this Arbitrator agrees.

An analysis of Section 1384 regarding conditions under which a seller's obligation to contribute and its contribution history is spelled out in the Section: In December 1982, the PBGC concluded that this section of the statute provided the exclusive method by which a seller may avoid withdrawal liability by transferring its obligation to an arms-length purchaser.

In the *Continental* case, *supra*, at 1337, the Arbitrator states, "One simply must assume, in the absence of even a glimmer in the legislative history of the Act indicating an assumption or belief that other principles of successorship might be applicable, that Congress intended and believes that Section 4204 provided the exclusive method of and criteria for applying successorship principles to *bona fide* arms-length sales of assets cases."

Hence, the refusal of Congress to provide for an automatic transfer of withdrawal liability must be construed to preclude the transfer of Cen-Vi-Ro withdrawal liability to Concrete Pipe.

The language found in *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985), may very well be depositive of the issue, where the Court held:

> "We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 62 L.Ed.2d 146, 100 Supreme Court 242 (1979): '[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of

> reading others into it.' [Cite omitted] 'The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme, including an integrated system of procedures for enforcement.' [Cite omitted]" 473 U.S. 148.

The second contention of the Trust relates to the labor law doctrine of successorship.

Concrete Pipe points out, and properly so, that the only published decisions which have discussed the applicability of the "successor employer doctrine" as it relates to withdrawal liability have been rejected. The cases cited by Concrete Pipe in support of its contention of the inapplicability of the "successorship doctrine" are: *Richland Industries Ltd v. Robins*, 617 F.Supp. 639 (N.D. Illinois 1985); *Paperworkers Local 286 Pension Plan and Kardon Industries, Inc.*, 6 EBC 2398 (1985); *Superior Pocahontas Inc. v. Island Creek Coal Co.*, 657 F.Supp. 796 (S.D. W.Va. 1987).

The Trust's contention in respect to the "successorship doctrine" finds no support in court cases. The following citation from the *Massachusetts Mutual Life Insurance Company v. Russell* case, *supra*, 473 U.S. at 146, " . . . the assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated and independent remedial scheme which is in turn part of a comprehensive and reticulated statute," makes it clear that Congress did not intend to imply a remedy not specifically spelled out in the statute.

In the labor law field, the successorship cases relied upon by the Trust are: *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *NLRB v. Burns International Security*

Services, Inc., 406 U.S. 272 (1972); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974), as well as the *Fall River Dyeing and Finishing Corp. v. NLRB*, 96 L.Ed.2d 22 (1987).

The court in the above-cited cases basically held that if it finds the employer to be a successor, then the successor assumes the obligation of bargaining collectively with the employees' representative which, of course, is quite different from assuming the Collective Bargaining Agreement of its predecessor.

For Concrete Pipe in order to be liable for the obligations of Cen-Vi-Ro, it would have to be shown that Cen-Vi-Ro, at the time of the transfer, had such an obligation in the first instance. To reiterate, the transfer of ownership took place in 1976, long before the enactment of MEPPA [sic]. Since Cen-Vi-Ro had no such withdrawal liability at the time of the transfer of ownership, no such transfer of liability to Concrete Pipe could take place.

In summary, since contractual liabilities under the successorship doctrine, as enunciated in *John Wiley & Sons v. Livingston, supra,* and *Golden State Bottling Co. v. NLRB, supra,* and others cited, are not applicable since the court did not require the parties to abide by the terms and conditions of the Labor Agreement, to which it had not agreed (unless it could be shown that the employer had actual notice and could have protected himself against such liability). In any event, for the reasons enunciated in *Richland Industries Ltd., supra,* it is concluded that the cases governing successor employers in labor cases have no application in ERISA cases.

As was pointed out in the *Richland Industries* case, at page 641, "A new employer, in other words, may be a successor for some purposes and not for others." The court further states, "In particular, Section 1384 of ERISA clearly establishes that a purchaser of assets may not be held liable for the seller's contribution history, absent a special arrangement with the seller by which the purchaser voluntarily assumes the liability."

It is clear that there could have been no voluntary arrangement between the seller, Cen-Vi-Ro, and the purchaser, Concrete Pipe, since neither party in 1976 was aware of a liability which was in the future to be known as withdrawal liability.

Accordingly, it is concluded that based upon the reasoning above, Concrete Pipe did not inherit the one-year contribution history of Cen-Vi-Ro when Concrete Pipe acquired ownership of the plant in 1976; hence, it is not liable for the share of withdrawal liability which was included by the Trust in its original calculation.

The contention by the Trust that the issue of Cen-Vi-Ro's contribution was not timely raised is without merit. There is sufficient evidence in the record to show that the issue was raised at least in 1982 and thereafter. In the instant phase, the ultimate issue to be resolved is the *amount* of Concrete Pipe's withdrawal liability to the Trust; accordingly, the matter of Cen-Vi-Ro's contribution is properly before the Arbitrator.

In its Closing Brief, the Trust has attached as Exhibit A the monetary consequence of a holding that one year of contribution be eliminated by recomputing the withdrawal liability. The adjusted withdrawal liability, taking

into account the exclusion of the one year of Cen-Vi-Ro contribution history, reduces the withdrawal liability of Concrete Pipe to $190,465.57. Incidentally, Concrete Pipe, in its Reply Brief of May 27, 1988, acknowledges the correctness of the amount as recomputed.

C. Were Actuarial Assumptions and Methods Reasonable in the Aggregate?

The statutory standards for reviewing the correctness of the actuarial calculations and assumptions are set out in 29 U.S.C. 1393(a) (1) and 1401(a) (3).

Section 1393(a) (1) provides, in pertinent part:

> "Withdrawal Liability under this part shall be determined by each Plan on the basis . . . actuarial assumptions, which, in the aggregate are reasonable taking into account the experience and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the Plan."

Further, Section 1401(a)(3) provides:

> "(A) For purposes of any proceeding under this section, any determination made by a Plan sponsor under Sections 1381 through 1399 of this title and Section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.
>
> "(B) In the case of the determination of a Plan's unfunded vested benefits for a Plan year, the determination is presumed correct unless a

party contesting the determination shows by a preponderance of the evidence that –

> "(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the Plan and reasonable expectations), or
>
> "(ii) the Plan's actuary made a significant error in applying the actuarial assumptions or methods."

In the case of *Michigan UFCW/Food Employers Pension Fund v. Eberhard Foods, Inc.*, 831 F.2d 1258 (6th Cir. 1987), the court upheld the Arbitrator's decision that the interest rate (6%) was not unreasonable. It held:

> "The burden of proof is on the employer. In meeting the burden, the test is not which withdrawal determination is the most reasonable but rather whether the challenged determination is unreasonable or clearly erroneous."

In recognizing the fact that actuaries may have different opinions, the court in *Eberhard, supra*, stated, at page 1261:

> "As the First Circuit observed in *Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1137 (1st Cir. 1985), the actual determination of withdrawal liability is not an exact science and therefore there is a range of reasonable actuarial determination of withdrawal liability [citation] Eberhard's actuary acknowledged this point, stating, 'I don't think there is a single answer as to reasonableness.' [citation] The statute does not anticipate that the actuary will always choose the figure the court would choose as the most reasonable from among the range. Rather,

> the only requirement is that in every case the actuarial determination will fall within the range of reasonableness . . . taking into account the unique characteristics of the Fund."

As pointed out by the Trust, all the Circuits with the exception of the Third Circuit in *United Retail v. Yahn*, 787 F.2d 128 (3rd Cir. 1986), have upheld and enforced the presumption.

In the intant case, the Martin E. Segal Company, the Trust's actuary, in calculating withdrawal liability used a method which takes into account a withdrawing employer's contributions to the Trust for a period of ten (10) years relative to the contributions of all other employers. The withdrawing employer is responsible for a proportional share of the Trust's "unfunded vested benefits" as that term is defined in Section 4213(c), i.e., as the value of nonforfeitable benefits under the Plan, less the value of assets of the Plan.

The Martin E. Segal Company has developed through the years a method which provides for two distinct interest rates. The method is sometimes referred to herein as the "two-tiered" method. The rates used under the Segal method are (1) the interest rates published by the PBGC for single employer plan terminations, and (2) the interest rate used by a pension plan for its funding valuation.

As between the two rates, the PBGC rate is fairly high while the rate for funding the Plan is relatively low.

What this method does is to provide for a blending of the two rates to arrive at the value of the nonforfeitable benefits.

To the extent that the market value on hand covers the liability, the investment return developed by the PBGC for single employer terminations would be applicable to determine the coverage provided by those current assets. In the instant case, as of December 31, 1980, and December 31, 1981, the corresponding investment return assumptions were 9.25% and 8.50%

To the extent the unfunded vested liability cannot be covered by the current assets (as is the case herein, where only one-third of the liability could be covered by the current assets), the remaining liability is determined by using the investment return rate of 6.0%, which is the same investment return rate assumption used by the Trust for funding purposes.

The explanation made by the Trust actuary is simply that hypothetically the current assets could be converted into cash and immediately invested to insure the payments of benefits in the future.

As should be pointed out, the investments on hand at the PBGC rates would not be sufficient to cover the liability for vested benefits and as a result thereof, the Trust actuary was required to make his "best estimate" based upon a long-range investment return. The Trust actuary made it clear that while PBGC rates could be applied to "money on hand," those rates could not be applied where funds are not available since there is no way to "lock in" a rate to funds which may be available in the future.

The Trust actuary in making his best estimate as to the future investment return based his estimate taking into account (a) historical long-term investment rates,

and (b) the Trust's own personal investment history. In doing so, the Trust actuary took into account the ten (10) year period from 1971-1980 and determined the *average* return for the period to be 6.85%. With that history in mind, the Trust actuary determined the 6.0% rate, which is the funding rate, to be reasonable taking into account further the melding of the PBGC rates of 9.25% and 8.50%. As can be seen, the melded rate is very close to the historical performance of the Trust.

Concrete Pipe in asserting the "two-tiered" rate was unreasonable called as its expert actuary witness Mr. Jon L. King. Mr. King is an enrolled actuary (Co. Exh. 13), and is presently employed as manager of Buck Consultants' Los Angeles office. He has been employed as a consulting actuary by Buck since 1986. King testified that his experience in pension plans has been limited to single-employer pension plans. Also, that Buck Consultants has no clients in California among the multi-employer pension funds.

King stated that he had reviewed the data upon which the actuary assumptions were made in the instant case and determined that there were three assumptions that concerned him: (1) the net income assumption, (2) unrecorded past credit assumption, and (3) lastly, the interest rate assumption. King allowed that the first two assumptions had minimal impact, so he focused on the interest rate assumption in coming to the conclusion that it was "unreasonable in the aggregate."

King further testified that he looked at "economic realities" in his analysis, "rather than looking at what assumptions are being used for this and that purpose by

other actuaries." King pointed out that he doesn't believe in following the "herd" (of actuaries).

In support of King's contention of the interest rate assumption being too low, King used his firm's published interest rates, entitled "Buck Forward Rates," which are a set of interest rates derived from the actual marketplace for risk-free United States securities, i.e., treasury bills and U. S. Government bonds and notes.

King expressed the opinion that he did not believe the assumptions used for funding were applicable to withdrawal liability cases and that not only was the interest rate assumption too low, but that the PBGC interest for single employer terminations was too low as well.

The standard that Mr. King would apply in consideration of whether the interest rate assumption was unreasonable or not would be that if it met the interest rate of the "Buck Forward Rates," it would be reasonable; otherwise, not.

It is interesting to note that King was unable to state any multi-employer pension fund which has used the "Buck Forward Rates" method.

It is noteworthy to point out the lack of expertise King has in respect to multi-Employer Pension Funds. There is a real difference between a multi-Employer Pension Fund and a single Employer Fund. In multi-Employer Funds, in a withdrawal situation, there is an ongoing continuation of the Plan. The employees of the withdrawing Employer are not dropped as participants of the Plan, but will continue to remain participants until such time as they are eligible for retirement benefits.

Further, notwithstanding the withdrawal of the Employer, the continuing Employers must continue their contributions to the Plan and the withdrawing Employer's obligation to the Plan must be balanced against the obligation of the Employers continuing to make contributions. In the termination of a single Employer plan, obligations to all plan participants are fixed and paid as of a certain date.

During his testimony in respect to reasonableness, King refers to the realities of the marketplace and competitive rates.

Actuaries, for the most part, agree that a funding valuation is not an exact science and, accordingly, there does not appear to be any one answer in defining "reasonableness." That being the case, the standards in the statutes, the court cases, as well as arbitrators' decisions, must be looked to in determining whether the facts in each case come within the parameters of the term "reasonable." In the *Eberhard* case, *supra*, the court upheld the Arbitrator's decision that the interest rate (6%) was *not* unreasonable.

While the actuary witness testifying for Concrete Pipe concludes that the Segal method in the determination of interest rate assumptions are unreasonable, he ignores 29 U.S.C. 1393(a)(l) of ERISA which mandates that the actuary take into account the experience of the plan and reasonable expectations. This the Segal Company has done in coming up with its best estimate.

Concrete Pipe's actuary concludes that the "two-tiered" method used in the computation of the withdrawal liability and the interest rate assumption used for

funding, as well as the PBGC rate, are "unreasonable in the aggregate."

The specific Segal method of using the interest rate assumption and the PBGC rates of interest comprising a blended rate have been the subject of numerous Arbitrator decisions.

Arbitrator William Hannan, in *Joy Mfg. Co.*, 5 EBC at 1135 (Feb. 1984), stated, "When we take into consideration that the 'blended rate' is a combination of the funding rate and the higher PBGC rate, we have an applicable rate which produces a withdrawal liability lower than the not unreasonable rate which most actuaries would have calculated . . . "

In *Ellis and Construction Laborers Pension Trust*, 5 EBC at 1175-76 (Feb. 1984), Arbitrator Martin Zimring upheld the use of the Segal formula as to blending of rates.

Walter Slater, the Arbitrator in *J. L. Denio, Inc. and Operating Engineers Pension Trust*, 8 EBC at 1990 (June 1987), states, "The boundaries of reasonableness appear to be PBGC rates on the high side and funding valuation rates on the low side. Somewhere in between we find such as the Segal Company's blend."

Concrete Pipe has the burden of rebutting the presumption of Section 1401 of ERISA and establishing by a preponderance of the evidence that the determination of the Plan sponsor was unreasonable. This they did not do.

IV

Conclusion

It is concluded, therefore, that Concrete Pipe has failed to carry the burden of overcoming the statutory presumption by a preponderance of the evidence.

V

Attorneys' Fees and Costs

Each party in this proceeding has requested that the legal expense, in the event of a successful result, be assessed against the other party. The Arbitrator does not feel justified in allocating either party's legal expense to the other. Both parties have acted in good faith and have diligently and professionally urged their respective positions; hence, each party will bear its own legal expenses and costs.

AWARD

At the outset of this phase of the arbitration proceedings, the parties agreed that the Arbitrator, after having taken evidence, hearing arguments as well as studying the briefs filed, would determine the money amount of the withdrawal liability due the Trust from Concrete Pipe and Products Company of California and render an appropriate award. Based upon the reasons aforesaid stated, the award is as follows:

1. Concrete Pipe and Products Company of California has failed to show by a preponderance of the evidence that, in the aggregate, the actuarial assumptions and methods used by

the Trust in the determination of Concrete Pipe and Products Company of California were unreasonable.

2. Concrete Pipe and Products Company of California is not liable for the one-year contribution history of Cen-Vi-Ro which was included in the Trust's original calculation.

3. Concrete Pipe and Products Company of California is liable for withdrawal liability of $190,465.57, plus accrued interest, to the Trust which the Trust acknowledges is the calculation of the liability using the same actuarial assumptions and methods as were applicable in the original calculation, except that the one-year contribution history of Cen-Vi-Ro is eliminated.

4. The Arbitrator's fees and expenses together with the administrative fees of the American Arbitration Association shall be shared equally by the parties. Each party shall bear its own costs and legal expenses.

/s/ Kenneth M. Schwartz
KENNETH M. SCHWARTZ, Arbitrator

Dated: August 16, 1988

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONCRETE PIPE AND PRODUCTS COMPANY OF CALIFORNIA, a California Corporation, Plaintiff, v. CONSTRUCTION LABORERS PENSION TRUST FUND FOR SOUTHERN CALIFORNIA, Defendant.	No. 88-05759LTL(Tx) ACTION PURSUANT TO 29 U.S.C. § 1401(b)(2) TO VACATE AND/OR MODIFY ARBITRATOR'S AWARD (Filed Sep. 26, 1988)

JURISDICTION AND VENUE

1. This court has jurisdiction pursuant to 28 U.S.C. § 1331, 29 U.S.C. § 186(c), 29 U.S.C. § 1401 and 29 U.S.C. § 1451.

2. Plaintiff Concrete Pipe and Products Company of California, a California corporation (hereafter "CP&P"), is an employer engaged in interstate commerce and/or an industry in interstate commerce. Plaintiff contributed to the defendant Construction Laborers Pension Trust Fund for Southern California consistent with the terms of a collective bargaining agreement.

3. Defendant Construction Laborers Pension Trust Fund for Southern California (hereafter "CLPT") is a multi-employer pension trust fund established and maintained by employers engaged in interstate commerce consistent with 29 U.S.C. § 186(c)(5) and 29 U.S.C. § 1001, *et seq.*

4. CLPT has contended that CP&P has an obligation to pay withdrawal liability under the terms of the Multi-Employer Pension Plan Amendments act of 1980 (MPPAA), 29 U.S.C. § 1301, *et seq.* CP&P has consistently denied that it has a withdrawal liability obligation.

5. On October 6, 1982, an action was filed by CP&P against CLPT in the Eastern District of California, which was ultimately transferred to this district. That case is currently pending as cause no. 82-5184-MML.

6. The dispute between the parties was ordered to arbitration in case no. 82-5184-MML. The arbitration has occurred, and a final decision was issued on August 16, 1988. CP&P brings this action to vacate and/or modify portions of the arbitrator's decision.

7. Venue of this action is properly in the United States District Court for the Central District of California pursuant to 29 U.S.C. § 1451(d).

8. This action is related to case nos. CV. 82-5184-HLH and 83-132-HLH pursuant to Local Rule 4.3.1, and plaintiff hereby provides "Notice of Related Case."

ALLEGATIONS REGARDING ARBITRATION

9. The arbitration matter was bifurcated and hearings held on two separates dates. The first phase of the hearing was held in Los Angeles, California on June 25, 1988 [sic]. That phase of the hearing was, by stipulation of the parties, to resolve the date on which CP&P withdrew for purposes of determining whether MPPAA was applicable to the CP&P withdrawal from CLPT.

10. Arbitrator Kenneth M. Schwartz issued his decision on this phase of the proceeding on August 27, 1988 [sic], concluding that CP&P's withdrawal was covered by MPPAA, and that CP&P would be liable for payment of its share of the unfunded vested liability of the pension plan. Arbitrator Schwartz erroneously determined that CP&P withdrew during 1981. A copy of Arbitrator Schwartz' decision and award on the first phase of the proceeding is attached as Exhibit A.

11. The second phase of the hearing was, by stipulation of the parties, to determine the amount of withdrawal liability, if any, which was due from CP&P. The hearing on this phase of the arbitration was held in Los Angeles, California, on February 18, 1988. Arbitrator Schwartz issued his decision on August 16, 1988, erroneously finding that CP&P was liable for withdrawal liability in the amount of $190,465.57, plus interest, but determined that neither party should be awarded attorney's fees for events leading up to the conclusion of the

arbitration. A copy of Arbitrator Schwartz' Decision and Order on the second phase of the proceeding is attached to this Complaint as Exhibit B.

12. This action to vacate and/or modify Arbitrator Schwartz' arbitration decision is timely filed pursuant to 29 U.S.C. § 1401(b)(2).

13. The arbitration decision should be vacated because:

(a) MPPAA violates numerous constitutional rights of plaintiff, including but not limited to those rights and violations described in cause no. 82-5184-HLH and 83-132-HLH;

(b) MPPAA, and particularly 29 U.S.C. § 1401, unconstitutionally deprives plaintiff of due process in the form of the right to an impartial decision maker prior to the taking of property. Plaintiff recognizes the existence of the Ninth Circuit's decision in *Board of Trustees of the Western Conference of Teamsters Pension Trust v. Thompson Building Materials*, 749 F.2d 1396 (9th Cir. 1984) cert. denied 471 U.S. 1054, 85 L.Ed.2d 481, 105 S.Ct. 2116 (1985), but submits that this case is wrongly decided and the correct analysis is provided in *United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3rd Cir. 1986) affirmed by equally divided court, ___ U.S. ___; ___ 95 L.Ed. 2d 692; 107 S.Ct. 567 (1987);

(c) A clear preponderance of the evidence establishes that the CP&P facility in question suffered a permanent cessation of operations on August 17, 1979, and is therefore not subject to coverage or withdrawal

liability under MPPAA, contrary to the arbitrator's finding.

14. The arbitrator's decision should also be vacated and/or modified because the clear preponderance of the evidence establishes that:

(a) The actuarial assumptions and methods used in the withdrawal liability calculation were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations);

(b) The plan's actuaries made significant errors in applying the actuarial assumptions or methods;

(c) CLPT failed and/or refused to apply the actuarial methods it adopted in computing CP&P'S withdrawal liability;

(d) At least ten percent of CLPT's unfunded vested liabilities result from a clear and flagrant breach of the trustee's fiduciary obligations, and the trustees are attempting to shift the damage caused by their own breach of fiduciary duty to withdrawing employers like CP&P;

(e) The arbitrator refused to consider and apply the reasonable actuarial assumption for interest rates, the market interest rates were for zero-risk U.S. government securities as reflected in the Buck Forward Interest Rates submitted into evidence during the hearing;

(f) CP&P should have been awarded attorney's fees for prevailing on the Cen-Vi-Ro contributions issue during the second phase of the proceeding.

WHEREFORE, plaintiff requests entry of an order granting it the following relief:

1. A declaration that CP&P withdrew from CLPT during 1979 prior to the effective date of MPPAA;

2. Vacating the arbitrator's decision awarding withdrawal liability against CP&P;

3. Alternatively vacating the portions of the arbitrator's decisions finding the actuarial assumptions used by CLPT were reasonable when viewed in the aggregate, taking into account the experience of the plan, and determining instead that CP&P's withdrawal liability would be a maximum of $41,523.15, plus interest;

4. Awarding CP&P's reasonable attorney's fees and costs incurred in the arbitration;

5. Awarding CP&P its reasonable attorney's fees and costs incurred in litigating this action; and

6. Granting CP&P such other and further relief as the court deems appropriate.

DATED: September 15, 1988.

By: /s/ Jeffrey Owensby
JEFFERY OWENSBY, An
Attorney with the firm
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JMN12/07

(Exhibits to Complaint Omitted in Printing)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CONCRETE PIPE & PRODUCTS COMPANY OF CALIFORNIA, Plaintiff, v. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant.	Case No. 88-05759 THE CONSTRUCTION LABORERS PENSION TRUST'S ANSWER TO THE COMPLAINT AND THE TRUST'S COUNTERCLAIM AGAINST CONCRETE PIPE & PRODUCTS COMPANY OF CALIFORNIA
CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Counterclaimant, v. CONCRETE PIPE & PRODUCTS OF CALIFORNIA, Counterdefendant.	(Filed Nov. 15, 1988)

ANSWER

1. Defendant Construction Laborers Pension Trust for Southern California ("Trust") answers the complaint of Concrete Pipe & Products Company of California ("Concrete Pipe") as follows:

Jurisdiction And Venue

2. Answering paragraphs 1 through 8, defendant admits all allegations.

Allegations Regarding Arbitration

3. Answering paragraph 9, defendant admits all allegations.

4. Answering paragraph 10, defendant admits that arbitrator Kenneth M. Schwartz issued his decision concluding that CP&P's withdrawal was covered by MPPAA, and that CP&P would be liable for payment of its share of the unfunded vested liability of the pension plan. Defendant also admits that a copy of the arbitrator's decision on the first phase of the proceeding is attached as Exhibit A to the complaint. Defendant denies that arbitrator Schwartz erroneously determined that CP&P withdrew during 1981. Instead, arbitrator Schwartz's decision that Concrete Pipe was liable for withdrawal liability is correct.

5. Answering paragraph 11, defendant denies that arbitrator Schwartz erroneously found that CP&P was liable for withdrawal liability in the amount of $190,465.57, plus interest. Instead, as alleged in the accompanying counterclaim, the Trust contends in the

alternative that the award of the arbitrator was correct, or if not correct, was for too low a figure and should instead for be for the original amount assessed the plaintiff of $268,168.81 plus accrued interest, attorneys' fees, and costs. Defendant admits all other allegations of paragraph 11.

6. Answering paragraphs 12 through 14, defendant denies all allegations.

Prayer for Relief

7. Wherefore, defendant requests a judgment in its favor granting the following relief:

a. That the complaint brought by Concrete Pipe be dismissed with prejudice,

b. That the Court enforce the arbitrator's award as issued or

c. Alternatively, modify the arbitrator's award as set out in the second count of the counterclaim,

d. Award defendant Trust its reasonable attorneys' fees and costs incurred in the arbitration and during Court proceedings both in the District Court and before the Ninth Circuit, and

e. Grant defendant Trust such further and other relief as the Court deems proper.

COUNTERCLAIM

8. As a counterclaim, counterclaimant The Construction Laborers Pension Trust for Southern California

("Trust") alleges against counterdefendant Concrete Pipe & Products Company of California ("Concrete Pipe") as follows:

Jurisdiction and Venue

9. This Court has jurisdiction of this counterclaim pursuant to 28 U.S.C. §1331, 29 U.S.C. §186(c), 29 U.S.C. §1401, and 29 U.S.C. §1451. In addition, this Court has jurisdiction of this counterclaim pursuant to Federal Rule of Civil Procedure 13.

Allegations Pertaining to All Counts

10. Defendant Concrete Pipe contributed to the Trust pursuant to a collective bargaining agreement entered into by Concrete Pipe and by its predecessor Cen-Vi-Ro Concrete Pipe & Products Co., Inc.

11. Counterclaimant Trust is a multi-employer pension trust fund established under Title 29 of the United States Code.

12. The Trust contends, and continues to contend, that Concrete Pipe has an obligation to pay withdrawal liability under the Multi-Employer Pension Plan Amendments Act of 1980 to the Trust in the principal amount of $268,168.81 plus accrued interest, attorneys' fees, and costs of collection. Concrete Pipe has, and continues to, deny liability for that amount, or for any other amount.

13. To enforce its assessment of withdrawal liability, on October 5, 1982, the Trust filed a complaint for collection of withdrawal liability in the Central District of

California, United States Court. That case was assigned Case No. 82-5184.

14. On October 6, 1982, Concrete Pipe filed a complaint seeking declaratory and injunctive relief to stop collection of withdrawal liability in the Eastern District which was assigned Case No. 82-389.

15. Subsequently, both cases were consolidated in the Central District under Case No. 82-5184. After cross-motions for summary judgment, the Court ordered the matter to arbitration.

16. This action is duplicative of the above-mentioned consolidated actions which are also pending before the Court and should therefore be consolidated with those other two cases.

17. After bifurcating the arbitration into two phases, one within which to determine liability and the second within which to determine the amount of withdrawal liability, the arbitrator held hearings and issued his award that Concrete Pipe & Products Company was liable for withdrawal liability in the amount of $190,465.57, plus interest. Copies of the arbitrator's opinions for the first and second phases and his award after completion of the second phase are attached as Exhibits A and B to the complaint of Concrete Pipe. They are incorporated herein by this reference.

18. In this counterclaim the Trust contends below that the Court should reach one of two decisions in reviewing the arbitrator's award. First, as alleged in Count One, the award should be modified to include the one year of contribution history that the arbitrator did

not consider in calculating 'the amount of withdrawal liability. Alternatively, should the Court determine that the one year contribution history was properly excluded, the Court should grant the relief requested in Count Two by affirming the arbitrator's award, plus entering an order awarding attorneys' fees and costs of suit, both in the District Court and before the arbitrator, in favor of the Trust.

Count One

19. The arbitrator's decision should be modified as follows:

a. In determining the amount of withdrawal liability for which Concrete Pipe was liable, the arbitrator improperly deducted one year of contribution history to the Trust made by the employer who sold the ongoing business to Concrete Pipe. When Concrete Pipe purchased the ongoing business, and continued its obligation to contribute to the Trust, Concrete Pipe inherited its predecessor's contribution history and is liable for its full share of the withdrawal liability based on the total contributions.

Count Two

20. Alternatively, should the Court determine that the arbitrator properly excluded the one year of contribution history prior to Concrete Pipe's purchase of the ongoing business, the arbitrator's award should be confirmed as issued, except that in addition, the Court should award the Trust its reasonable attorneys' fees and

costs, incurred both before the arbitrator and in the prior and present District Court and Ninth Circuit proceedings.

Prayer for Relief

21. Wherefore, the Trust prays for relief as follows:

a. The Court should modify the arbitrator's award to provide for a finding and award of withdrawal liability in the principal amount of $268,168.81,

b. Alternatively, the Court should enter its judgment affirming and enforcing the arbitration award of $190,465.57, plus interest,

c. Regardless, under either of the above awards, the Court should in addition award the Trust its attorneys' fees and other costs of suit in both the Court proceedings and the arbitration, and

d. The Court should award the Trust such further relief as proper.

COX, CASTLE & NICHOLSON

November 15, 1988

By: /s/ Everitt G. Beers
Everitt G. Beers

Attorneys for The Construction Laborers Pension Trust for Southern California

(Exhibits to Answer and Counterclaim Omitted in Printing)

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA	)	CV 82-5184 HLH CV 88-5759 HLH
Plaintiff	)	ORDER RE CROSS MOTIONS TO VACATE/ MODIFY/CONFIRM ARBITRATION AWARD
vs.	)	
CEN-VI-RO CONCRETE PIPE AND PRODUCTS	)	
Defendant	)	(Filed Jul. 5, 1989)

The motion of Concrete Pipe and Products Company of California, Inc. (hereinafter CPP), is treated as a petition to vacate the arbitration award, and is denied. The motion of Construction Laborers Pension Trust (hereinafter CLPT) to confirm the arbitration award is granted. To the extent that the motion to confirm the award seeks to "modify" the award, such is treated as a motion to vacate and is denied. The judgment is to be entered confirming said award, plus interest from the filing of case CV 82-5184, plus attorney's fees for the court litigation (but not the arbitration proceeding). CLPT is to submit the form of judgment.

This order will serve as the findings of fact and conclusions of law unless either party wishes more formal findings and conclusions, in which case, same shall be drafted by CLPT. Attorney's fees shall be claimed on the cost bill, with a supplementary declaration or declarations setting forth the basis of the fees claimed. The Court adopts as its findings and conclusions the opinions of the

arbitrator except as specifically set forth, and makes certain additional findings and conclusions herein.

1. PRIOR PROCEEDINGS IN THIS COURT

The Court adopts the legal conclusions of Judge Lucas in his determinations of 4/4/84. It is noted that the Ninth Circuit declined to consider an appeal as to those conclusions. With the rendering of final judgment herein, those conclusions may now be reviewed (except, perhaps, as they have become moot).

2. CONSTITUTIONALITY OF MPPAA

The Court will not declare any of the provisions of MPPAA unconstitutional. While a district court can presumably reach a conclusion that a statute is unconstitutional in whole or in part, such is normally done by appellate courts who are charged with the necessary constitutional wisdom by virtue of their institutional position in the judicial hierarchy.

Furthermore, the Ninth Circuit has held constitutional many of the provisions of MPPAA which CPP challenges, with the implication being that the rest is also constitutional *See Board of Trustees v. Thompson Building Materials*, 749 F.2d 1396 (9th Cir. 1984). Only one aspect of the Act has been declared unconstitutional. *See United Retail and Wholesale Employees v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3rd Cir. 1986), aff'd by divided Court, 481 U.S. 735 (1987). While the affirmance got three votes in the Supreme Court, it did not get five and is thus not binding here.

The Ninth Circuit's decision in *Thompson* is, however, binding on this court (and on any three judge panel of the Ninth Circuit), and the Court will follow it. CPP argues that the facts of this case are distinguishable from those in *Thompson* on the grounds that the Ninth Circuit decision was premised on a factual conclusion that the trustees did not have a conflict of interest, while the trustees in the case at hand do. The Court rejects this line of reasoning. It does not read the *Thompson* as being limited to the specific facts of that case. To the extent that the arguments that the Trustees of CLPT have a conflict in making presumptively valid determinations has constitutional merit, such arguments should be presented to the Court of Appeals, presumably *en banc*.

3. WITHDRAWAL LIABILITY

The primary dispute between that parties is the date of withdrawal from the plan. Under MPPAA, an employer may be liable for complete withdrawal liability where it either: 1) permanently ceases to have an obligation to contribute under the plan; or 2) permanently ceases all covered operations under the plan. *See* 29 U.S.C. § 1383(a). The arbitrator concluded that the closing of the Shafter plant in late 1979 – early 1980 (prior to the date of MPPAA effectiveness) was merely temporary, as shown, *inter alia*, by the reopening of the plant in 1981, causing withdrawal liability to be created as of the date that CPP's obligation under its collective bargaining agreement ended.

A. Standard of Review

As noted above, the Court will not second guess Judge Lucas' determination that the date of complete withdrawal is a question to be decided in the first instance by the arbitrator. The factual finding of the arbitrator regarding the date of withdrawal from the plan is to be upheld unless it is against the "clear preponderance" of the evidence. *See* 29 U.S.C. § 1404(c). Presumably this means more than a mere preponderance and something less than a "clearly erroneous" standard.

CPP argues that a *de novo* standard of review is appropriate for all of the conclusions reached by the arbitrator with respect to the issue of liability. However, the Court believes that the more deferential standard of § 1404(c) must be applied to the findings of fact, including the factual inferences drawn from the facts by the arbitrator.

B. Permanence of Closing of Shafter Facility

The factual findings of the arbitrator regarding the date of withdrawal from the plan are not contradicted by a clear preponderance of the evidence. In challenging the findings of the arbitrator, CPP makes several assumptions which the Court does not accept. CPP assumes that whether a business permanently ceases "all covered operations" under the plan is dependent only (or primarily) on its subjective intent when it closes a plant. It also assumes that only its intent with regard to the operation of a particular plant is to be considered. And, it further assumes that subsequent events may not be looked at in

determining whether all covered operations have ceased. The Court agrees with none of these assumptions.

As to the intent at the closing of the plant, the Court does agree with CPP that such is not wholly irrelevant and is one fact to consider among many facts, but does not agree that such intent at a particular time is factually or legally determinative of the issue to the exclusion of other facts.

Here the evidence is consistent with the conclusion drawn by the arbitrator that CPP did not intend to permanently cease operations at the Shafter plant, but that CPP merely closed what was apparently at the time an uneconomical operation. When the plant again became economical, it was reopened for a period, thus demonstrating that the closing was conditional. As powerfully set out by the arbitrator, CPP's retention of the site, the sending of salesmen into the area, and the negotiation and conclusion of a contract for which the plant was later reopened, all negate an intent to abandon permanently the covered operations at the Shafter plant. Thus, the arbitrator had sufficient basis to conclude that the date of cessation of the obligation to pay benefits (which was after the effective date of MPPAA) was the date of complete withdrawal.

CPP argues that the facts on which the arbitrator relied have other explanations. For example, CPP claims that the reason it continued to renew leases on the property was solely to avoid having to clear the site as required by its lease. The Court notes that this explanation is not wholly convincing, since renewal of the lease would only postpone the inevitable cost of clearance,

assuming permanent cessation. More importantly, the conclusions of and the inferences drawn by the arbitrator are reasonable and support the decision, which is not contrary to the clear preponderance of the evidence, or indeed, contrary to a mere preponderance.

The fact that the plant was reopened when a favorable economic opportunity arose is itself strong evidence that it was not permanently closed, but only closed during the pendency of a particular economic condition. The Court will not interfere with the factual determination of the arbitrator.

CPP argues that the arbitrator's decision "does violence" to the statutory scheme of MPPAA. It points to 29 U.S.C. § 1387 (which allows waiver or reduction of liability where a withdrawing employer later reenters a plan). CPP concludes that this section proves that an employer may withdraw from a plan multiple times, and thus, that withdrawal must be determined on the date the plant was closed without reference to subsequent events. The Court rejects this line of reasoning. Section 1387 is designed to deal with a different problem: where liability is assessed, but the withdrawal turns out not to have been permanent. That situation is not presented by the facts at hand. In fact, Section 1387 could be interpreted in a manner exactly contrary to CPP's analysis. That section may indicate that only withdrawals which turn out based on subsequent developments to have been permanent establish full liability under MPPAA.

Finally, the Court rejects the claim that its decision will result in violation of the purposes of MPPAA. CPP asserts that acceptance of the "mothballing" theory will

result in plans being strung along by an employer with claims that a cessation of covered activity is merely temporary. However, as noted above, the terms of MPPAA deal with the problem of withdrawals that appear permanent but later prove to have been temporary. *See* 29 U.S.C. § 1387. The obvious solution is to assess liability against such an employer and allow it to later move under Section 1387 for a recovery.

4. AMOUNT OF WITHDRAWAL LIABILITY

Both sides challenge the arbitration award as to the amount of liability. The CLPT asserts that the arbitrator erred in not including the contribution history of CEN-VI-RO (the prior owner of the facility in question, which sold the plant to CPP in 1976). CPP, on the other hand, claims that the actuarial assumptions used by the plan are unreasonable, that the sum assessed includes liabilities which were the result of a breach of fiduciary duty by CLPT, and that the trust ignored its actuary's policy with respect to discount rates where an employer pays in a lump sum.

A. CLPT's Claims

The Court rejects the trust's challenges to the amount of withdrawal liability. The Court agrees with the arbitrator that MPPAA does not mandate consideration of the prior contribution history of CEN-VI-RO. *See* Arbitration Award of August 16, 1988 at pp. 10-17. 29 U.S.C. § 1384(b) is limited to situations where liability is escaped by a seller of covered assets under § 1384(a). Likewise, the doctrine of successor liability is inapplicable, since there

was no notice that CPP would acquire MPPAA liability (the Act had not even been passed on the date of the acquisition).

B. CPP's Claims

The Court also rejects the challenges of CPP to the amount of liability. CPP earnestly insists that that it is unconstitutionally unfair for an interested party to make a determination which binds its adversary and to have that determination given presumptive effect by the courts or arbitrators. However, the statute so provides, and, as set forth above, this has been approved by the Ninth Circuit. Thus, CPP has the burden of showing that the actuarial assumptions were "in the aggregate unreasonable" or that the "plan's actuary made a significant error in applying the actuarial assumptions or methods. *See* 29 U.S.C. § 1401(a)(3).

The plan's actuary had the significant fortifying feature of being the most widely recognized in the field, with massive experience nationwide in advising pension trustees. CPP attacked the assumptions with an actuary of vastly less experience (in fact no experience with multi-employer trusts). While the use of any economic prediction factor can be debatable, the Court cannot say, or come close to saying, that the conclusions of the arbitrator are against the clear preponderance of evidence. The Court accepts the reasoning of the arbitrator in this respect and adopts his findings.

The Court also rejects the claim raised by CPP that the calculated liability includes amounts that are the result of violations of fiduciary duty by the trustees. CPP

has no standing to complain about a trust policy that extended the amount of time necessary for vesting (to 15 years) and increased the pensions of already vested employees (by 10%). *See Ponce v. Construction Laborers Pension Trust of Southern California*, 774 F.2d 1401 (9th Cir. 1985). Furthermore, the *Ponce* case did not hold that the *increase* in the pensions was a breach of duty, but that the overly long vesting period was. Thus, the holding provides no support for CPP.

Finally, the Court does not accept the claim that the trust violated its own actuary's policy of calculating withdrawal liability at a higher discount rate where an employer is willing to pay in a lump sum. That policy is designed to lower liability where the trust is not required to accept interest rate and other economic risk because an employer pays its withdrawal liability completely upfront. CPP has not done so. In fact, to this day, it has not paid its liability and professes that it intends to delay so doing until it has a chance to appeal to the Circuit Court.

5. ATTORNEY'S FEES AND COSTS

CLPT is entitled to its fees and costs for the court work. *See Lads Trucking Co. v. Board of Trustee*, 77 [sic] F.2d 1371 (9th Cir. 1985)(trust entitled to fees in "action" under ERISA). However, MPPAA appears to leave the question of attorney's fees incurred in an arbitration proceeding to the discretion of the arbitrator. *See* 29 U.S.C. § 1401(a)(2) (arbitrator may award reasonable attorney's fees). In this case, the arbitrator decided that each side should bear its

own attorney's fees. Hence, CLPT may not recover those amounts with respect to the arbitration proceeding.

IT IS SO ORDERED.
DATED: 7/3/89

/s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES/CLOSING

Case No. CV83-132-HLH Date 7/7/89

Title Concrete Pipe & Products Co. of Ca. v. The Construction Laborers Pension Trust for S. Ca

Present HARRY L. HUPP, Judge

Robert Bolton	not present
Deputy Clerk	Court Reporter

Attorneys for Plaintiff	Attorneys for Defendant

Proceedings: [ ] In Court
[XX] In Chambers
[ ] Counsel Notified

[ ] Case previously closed in error. Make JS-5.

[ ] Case should have been closed on entry dated _____. Make JS-6.

[ ] Case settled but may be reopened if settlement is not consummated within _____ days. Make JS-6.

[X] Other: The Order in CV82-5184-HLH and CV88-5759-HLH dated July 5, 1989 is also applicable to this case and the proposed judgment should include the case number. (Ent. 07/10/89) JS-6.

[ ] Entered _____.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONSTRUCTION LABORERS PENSION TRUST OF SOUTHERN CALIFORNIA, Plaintiff, vs. CEN-VI-RO CONCRETE PIPE & PRODUCTS CO., Defendants.	)	No. CV 82-5184-HLH (JRx) No. CV 83-132-HLH No. CV 88-5759-HLH (JRx) NOTICE OF APPEAL
CONCRETE PIPE AND PRODUCTS COMPANY OF CALIFORNIA, a California Corporation, Plaintiff,	)	(Filed Aug. 4, 1989)

v.

CONSTRUCTION LABORERS PENSION TRUST FUND FOR SOUTHERN CALIFORNIA,

Defendant.

NOTICE IS HEREBY GIVEN that Concrete Pipe and Products of California, Inc., defendant in case no. CV 82-5184-HLH, above, plaintiff in case no. CV 83-132-HLH above, and plaintiff/petitioner in case no. CV 88-5759-HLH, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the orders regarding cross-motions to vacate/modify/confirm arbitration entered on July 5, 1989, and July 10, 1989, in cases 82-5184-HLH, 88-5759-HLH, and 83-132-HLH, respectively. Defendants also appeal from the order of Judge Malcolm Lucas filed April 4, 1984, in case numbers 82-5184-MML, 83-132-MML as that order has now become final and appealable pursuant to *Construction Laborers Pension Trust v. Cen-Vi-Ro Concrete Pipe and Products Company, Inc.*, 776 F.2d 1416 (9th Cir. 1985).

Pursuant to Local Rule 17.1, the names of all parties to the judgment and order are Concrete Pipe and Products of California, Inc. and Construction Laborers Pension Trust for Southern California. These two parties constitute all parties to all three actions consolidated in the judgments and/or orders referred to above. The attorneys for Concrete Pipe and Products are Dennis R. Murphy and James M. Nelson, Diepenbrock, Wulff, Plant &

Hannegan, P.O. Box 3034, Sacramento, California, 95812-3034. The attorneys for Construction Laborers Pension Trust for Southern California is Everett G. Beers, Cox, Castle & Nicholson, 2049 Century Park East, 28th Floor, Los Angeles, California, 90067.

DATED: August 3, 1989. DIEPENBROCK, WULFF, PLANT & HANNEGAN

By: /s/ James M. Nelson
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JMN19/29

(Certificate Of Service Omitted In Printing)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,	No. 89-55854
Plaintiff-Appellee,	D.C. No. CV-82-5184-HLH
v.	**MEMORANDUM***
CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,	(Filed Jun. 27, 1991)
Defendant-Appellant.	

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding
Argued and Submitted May 6, 1991
Pasadena, California

Before: HUG, NORRIS, and LEAVY, Circuit Judges

We affirm the district court's decision. Whether Concrete Pipe & Products of California ("Concrete Pipe") withdrew from the employee benefits plan before the Multi-Employer Pension Plan Amendments Act of 1980

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

("MPPAA") was properly sent to arbitration. *See Teamsters Pension Trust Fund Bd. of Trustees of Western Conf. v. Allyn Transp. Co.*, 832 F.2d 502, 505 (9th Cir. 1987).

We affirm the arbitrator's calculation of withdrawal liability for the reasons stated by the district court.

Concrete Pipe's constitutional challenges to the MPPAA are controlled by *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986) and *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1400 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

Appellees are entitled to attorney's fees on appeal pursuant to 29 U.S.C. § 1132(g)(2)(D). *See Lads Trucking Co. v. Bd. of Trustees of Western Conf. of Teamsters Pension Trust Fund*, 777 F.2d 1371, 1375-76 (9th Cir. 1985).

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,	No. 89-55854
Plaintiff-Appellee,	D.C. No. CV-82-5184-HLH
v.	**ORDER**
CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,	(Filed Sep. 24, 1991)
Defendant-Appellant.	

Before: HUG, NORRIS, and LEAVY, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

No. 91-904

In The

Supreme Court of the United States

October Term, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON THE MERITS BY PETITIONER

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QUESTIONS PRESENTED FOR REVIEW[1]

(1) Do the provisions of the Multiemployer Pension Plan Amendments Act violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied,* by retroactively imposing withdrawal liability on an employer who never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?

(2) Do the presumptions in 29 U.S.C. § 1401 favoring multiemployer plans like Construction Laborers Pension Trust for Southern California violate the due process rights of Concrete Pipe and Products by denying access to an impartial decision maker?

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[1] The petition for a writ of certiorari was granted limited to Questions 2 and 4 presented by the petition. Question 4 presented by the petition corresponds to Question 1 of this brief, and Question 2 remains Question 2. Petitioner has changed the order of the Questions Presented to conform to the structure of the Petitioner's Argument.

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[2] CERTIFICATION PURSUANT TO RULE 24.1(b) AND 29.1

The only parties to this action are those listed in the caption. Petitioner Concrete Pipe and Products of California, Inc. has no subsidiaries, and its parent corporation is Concrete Pipe and Products, Inc. Construction Laborers Pension Trust for Southern California, Respondent, is a Taft-Hartley Trust Fund, and to the best of petitioner's knowledge, has no parent or subsidiaries.

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I.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 1991, in an unpublished opinion (table entry at 936 F.2d 576 (9th Cir. 1991)). J.A. 431-432. A timely petition for rehearing and suggestion for rehearing *en banc* was filed. Both were denied on September 24, 1991. J.A. 433. The order granting enforcement of the arbitration decision and denying Petitioner's motion for summary judgment by the United States District Court for the Central District of California is printed in the Joint Appendix at pages 416-427. The arbitrator's decisions as enforced by the District Court are printed in the Joint Appendix at pages 205-216 and 378-402. An earlier Ninth Circuit decision finding the appeal from an order requiring arbitration premature was reported at 776 F.2d 1416 (9th Cir. 1985).

II.

THE SUPREME COURT'S JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on June 27, 1991. A timely petition for rehearing and suggestion for rehearing *en banc* was filed. Both were denied on September 24, 1991. The Petition for Writ of Certiorari was filed on December 3, 1991 and was granted on May 26, 1992 limited to questions 2 and 4 presented by the petition. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The issues on which this court granted review involve the Fifth Amendment to the United States Constitution which provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provisions challenged are contained in the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which enacted Part 1, Subtitle E, Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), codified at 29 U.S.C. §§ 1381-1453. The applicable statutory provisions are attached in Appendix A to this Brief at pages 1a-39a.

IV.

STATEMENT OF THE CASE[3]

A. Concrete Pipe and Products of California, Inc.

The Petitioner, Concrete Pipe and Products of California, Inc., ("CP&P") is a California corporation formed to establish an operation for the manufacture and sale of concrete pipe in California. Certain assets of Cen-Vi-Ro, a separate and distinct entity, were purchased in December 1976 (four years prior to the enactment of MPPAA) to create CP&P. CP&P and Cen-Vi-Ro had no relationship of any kind other than this arm's length sales transaction.

[3] All references to the Record ("R.") are to the Docket Entries of District Court Case No. 82-5184 except where otherwise stated.

The assets purchased included two plants with accompanying manufacturing equipment. One plant was located in Southern California in the town of Shafter. The other plant was located in Northern California, near Sacramento. CP&P sold its concrete pipe throughout the state. This case focuses on events at the Southern California plant, hereafter referred to as the "Shafter Facility".

After purchasing the assets which comprise the Shafter Facility, CP&P abided by the collective bargaining agreements between Cen-Vi-Ro and a number of unions including the Southern California District Council of Laborers (the "Laborers"). Pursuant to that union contract, CP&P made contributions (based on hours worked by its employees who performed duties as laborers) to the Construction Laborers Pension Trust for Southern California ("CLPT").

In 1978, CP&P negotiated a new contract with the Laborers covering the Shafter Facility. Contributions for pension under this contract continued to be measured by hours worked by covered laborers at Shafter. J.A. 75-76 at ¶¶ 8 and 10.

B. Construction Laborers Pension Trust of Southern California.

(1) CLPT's Basic Structure.

The Respondent CLPT is a multiemployer pension trust fund which was established in 1962. It is regulated by Section 302 of the Labor Management Relations Act of 1947[4] (codified as amended as 29 U.S.C. § 186) ("Section

[4] The LMRA is also known as the Taft-Hartley Act.

302"). Generally, Section 302(a) prohibits payments by an employer to any representative of his employees unless a specific exception in Section 302(c) applies. The exception applicable here is Section 302(c)(5) which permits trust fund contributions if precise requirements are met. Specifically, CLPT must be established "for the sole and exclusive benefit" of the employees pursuant to a written document which describes the detailed basis on which the payments are to be made.

Employers and employees must be equally represented in the administration of the fund. However, the management-appointed trustees "represent" the employer only in the sense that they should ensure that the union-appointed trustees do not abuse their trust with respect to the funds contributed by the employer. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 n.13 (1981). In *Amax Coal*, the Court held that the fiduciaries of such plans are required to operate them for the sole and exclusive benefit of the employees regardless of the interest of the party that appointed the trustee. *Id.* at 330. The fact that the trustees are also frequently the collective bargaining representatives does not alter this statutory duty.

The CLPT trust agreement was entered into between the Laborers and several multiemployer associations. J.A. 75 at ¶ 6. Half of CLPT's trustees are selected by the Laborers and the other half are selected by the various multiemployer associations. *Id.* The employer associations consisted of the Building Industry of California, Inc., the Engineering Contractors Association, and the Southern California Contractors Association, Inc. J.A. 80 at ¶ 29. CP&P was not a contractor, has no contractor's license, and was not a member of any of these multiemployer associations at any time. *Id.* CLPT's revenue

comes from contributions from CP&P and other signatory employers, and earnings on investments. J.A. 342-343.

(2) CLPT Trustee Authority.

The CLPT trustees have broad discretionary authority in the exercise of their fiduciary responsibilities. The trustees have the power to: (a) establish, adjust, and increase pension benefits; (b) make decisions affecting CLPT administrative costs, including the hiring and firing of actuaries and administrators; (c) make investment decisions regarding plan assets; and (d) select actuarial assumptions or methods and accounting principles or methods on which CP&P's unfunded "vested" liabilities are computed and withdrawal liability calculated. J.A. 79-80, at ¶¶ 28-29; *see also Ponce v. Construction Laborers Pension Trust*, 582 F. Supp. 1310, 1312-1314 (C.D. Cal. 1984).

(3) Trust Agreement Limitations on Employer Liability.

The trust agreement specifically states that no benefits are guaranteed, and the employer's obligation is strictly limited to contributions required under the union contract. Article IV, §§ 4.07 and 4.08 of the declaration of trust for CLPT provide:

> Section 4.07. Neither the Association or (sic) any officer, agent, employee or (sic) committee member of the Associations shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent that he may incur liability

as a Trustee as hereinafter provided. The liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operation of the Fund or of the Pension Plan, except as may be hereafter provided in the Collective Bargaining Agreements.

Section 4.08. Neither the Associations, any Individual Employer, the Union, any Local Union, nor any Employee shall be liable or responsible for any debts, liabilities or obligations of the Fund or the Trustees.

J.A. 80-81 at ¶ 32.

The limitation on employer liability and the absence of a guarantee of pension benefits are reinforced in Article X § E(4) of the 1977-1980 Laborers' Craft Master Labor Agreement, which provides:

> The parties recognize and agree that the Pension Trust and Plan was created, negotiated, and is intended to continue to be if permitted by law under ERISA, a defined contribution plan and trust and that the individual Contractors' liability with regard to the pension has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements.

J.A. 82 at ¶ 34.

These provisions are important in assessing the extent of: (1) CLPT participants' justifiable reliance on any alleged

benefit guarantee; and (2) CP&P's commitment to make additional contributions or pay for any additional pension liabilities. *See Connolly v. PBGC*, 475 U.S. 211, 235 (1986) (O'Connor, J., concurring).

C. The Union Contract.

CP&P was signatory to a "plant" agreement which covered only those of its employees at the Shafter Facility. R. 124, CP&P Ex. 9. The union contract provisions regarding pension contributions state:

> The employer agrees to contribute the sum of $1.00 and 20/100 ($1.20) an hour for each hour worked or paid for, for each employee who works under a classification of the agreement covered by the Laborers Union Local 220. R. 124, CP&P Ex. 9, 1987 Arbitration Transcript pp. 78-79.

The CP&P agreement also incorporated terms of the Laborers' Craft Special Working Rules and Wage Scales which were contained in Appendix K to the Southern California Master Labor Agreements, which provided:

> **Important**
>
> PENSION BENEFITS ARE NOT AND HAVE NEVER BEEN GUARANTEED. THEY ARE PAYABLE ONLY TO THE EXTENT THAT THE FUND HAS ASSETS TO PAY BENEFITS. NEITHER YOUR EMPLOYER NOR YOUR UNION HAS ASSUMED ANY LIABILITY, DIRECTLY OR INDIRECTLY, TO PROVIDE MONTHLY PENSION BENEFITS. YOUR EMPLOYER'S SOLE OBLIGATION IS TO MAKE CONTRIBUTIONS CALLED FOR IN ITS COLLECTIVE BARGAINING AGREEMENT. THE PENSION PLAN HAS ALSO BEEN CONSIDERED BY THE

EMPLOYERS, THE UNION AND THE TRUSTEES TO BE A DEFINED CONTRIBUTION PLAN.

(emphasis in original) J.A. 81-82 at ¶ 33.

The collective bargaining agreement did not guarantee or specify any certain pension benefit levels for CP&P employees. J.A. 80 at ¶ 31. Thus, to the extent an employer might obtain some labor relations benefit from having guaranteed benefits promised to its employees[5], CP&P had no such benefit here.

D. Source of the Unfunded Vested Liability.

The CLPT has not been a model of operating efficiency or compliance with either Section 302(c)(5) or ERISA. During the years prior to CP&P's involvement, CLPT's trustees engaged in activities which constituted structural violations of Section 302(c). *See Ponce v. Construction Laborers Pension Trust*, 774 F.2d 1401 (9th Cir. 1985). The sources of CLPT's "unfunded" liability are chronicled in published decisions of courts in the Ninth Circuit. The Court is asked to take judicial notice of these decisions just as the arbitrator, District Court and Ninth Circuit were asked to take notice below.

CLPT had a 15-year cliff-vesting schedule for many years. Employees were required to have 15 years of essentially continuous service before becoming entitled to any benefit of any kind. *Ponce, supra*, 774 F.2d at 1402. This vesting schedule resulted in 96% of the potentially

[5] *See Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1124, 1129 (1st Cir. 1984), *rev'd on other grounds*, 762 F.2d 1137 (1st Cir. 1985), citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976).

eligible participants in the plan being excluded from benefits. *Id.*

The gross monthly benefit was calculated by multiplying the years of credited service earned by the participant by a monthly benefit factor. The monthly benefit factors set by the trustees between June 1962 and June 30, 1980 were:

January 1, 1963	$ 2.67
July 1, 1965	$ 5.40
June 1, 1966	$11.75
December 1, 1969	$13.75
October 1, 1970	$32.40

Ponce, supra, 582 F. Supp. at 1314. The 235% increase in the value of all vested service implemented on October 1, 1970 coupled with CLPT's failure to shorten the vesting schedule was held to be a breach of the Section 302(c)(5) fiduciary duty. *See id.* at 1318, *aff'd*, 774 F.2d 1401 (9th Cir. 1985).

In 1976, CLPT made an effort to comply with ERISA and reduced its vesting schedule from 15 years to 10 years. *Ponce, supra*, 774 F.2d at 1402. This change in the vesting schedule added 10 years or more of service credits to the plan's liability for many participants. It also vested employees who might otherwise have suffered a forfeiture. The impact on CLPT's assets-to-liability ratio was obviously devastating.[6]

[6] CP&P was not created until December 1976, but it is unclear from the record whether the change in the vesting schedule occurred before or after Petitioner began contributions. This factual question is irrelevant because CP&P had no power of any kind to influence decisions by the CLPT trustees to increase benefits. J.A. 79 at ¶ 28.

The 1980 benefit increase is also significant. After the Shafter Facility closed in October 1979, no contributions were made by CP&P to CLPT other than the $48.60 contributed in May 1980. J.A. 78 at ¶ 20. The CLPT trustees increased the value of benefits from 32.40 to 35.64 (approximately 10%) for active employees as well as for retirees effective July 1, 1980. R. 124, Jt.Ex. 7E, p.3., 1988 Arbitration Transcript p. 116. At the time, CLPT's "unfunded" liability under its benefit schedule was approaching one-half billion dollars.[7] Even so, CLPT has never failed to pay any scheduled benefits to any employee, and assets continued to grow. J.A. 79 at ¶ 26; J.A. 342-343.

E. Relationship Between CP&P and CLPT.

CP&P has never exercised any kind of control or participated in management of CLPT. J.A. 79 at ¶ 28. No shareholder, officer, director, agent, or representative of CP&P has had any participation in (a) investment decisions pertaining to any assets of the trust, (b) decisions by CLPT trustees to adjust pension benefit levels, (c) decisions affecting CLPT administrative costs, or (d) the selection of actuarial assumptions or methods or accounting principles or methods upon which CP&P's asserted withdrawal liability has been calculated. J.A. 79-80 at ¶ 28.

CP&P regularly contributed to the trust from December 1, 1976 through October 1979. J.A. 76 at ¶ 10. CP&P's

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[7] The aggregate unfunded liability under its benefit schedule as of December 31, 1980 was $514,181,200.00. J.A. 79 at ¶ 27; J.A. 158.

total contributions (including the one $48.60 payment in May of 1980) to CLPT were $102,656.68. *Id.*

The 10-year vesting schedule continued during CP&P's brief association with CLPT. The three years during which CP&P contributed to CLPT were obviously insufficient for any CP&P employees to receive even one-third the number of years of service necessary to obtain a vested pension benefit.

F. Closure of the Shafter Facility.

On August 17, 1979, all production ceased as CP&P closed the Shafter Facility with the goal of relocating to a different community. J.A. 77 at ¶¶ 14 and 16. CP&P desired to relocate to Riverside or San Bernardino Counties, areas geographically closer to the Los Angeles/Orange County growth where there was a substantial demand for concrete pipe. CP&P's nine largest competitors were located in these areas. Extensive efforts were made to find a new location in Southern California which were not successful.

By October 1979, the Shafter Facility was completely shut down. J.A. 78 at ¶ 17. One hundred percent (100%) of covered operations (Laborers work) had ceased and only two full-time workers remained at the Shafter Facility, neither of whom was covered by a contract requiring contributions to CLPT. J.A. 78 at ¶ 18. The pipe manufacturing equipment was dismantled and shipped to the other plant in Sacramento. J.A. 77 at ¶ 16.

CP&P's contributions to the CLPT ceased for all practical purposes in October 1979. J.A. 78 at ¶ 17. The only exception was the May 1980 $48.60 contribution. J.A. 78 at ¶ 20.

(1) Bargaining Regarding the Closed Plant.

In April 1981, the Laborers provided notice of intention to terminate the 1978 union contract and requested negotiations for a successor contract covering the Shafter Facility. J.A. 76-77 at ¶¶ 11-12. CP&P also provided notice of termination to all unions which had contracts covering the Shafter Facility. J.A. 85-86, Ex.A to R. 49. The notice informed the unions that CP&P was willing to bargain, but the negotiations would be of little value since the plant was closed with absolutely no intention of reopening. CP&P's notice was issued in cautious regard for the possibility of a duty to bargain under 29 U.S.C. § 158(d) and the unstable law at the NLRB governing that duty as applied to employers closing or relocating plants.[8]

The principal term of the contract between CP&P and the Laborers expired on June 30, 1981. J.A. 76 at ¶ 9. The contract also provided that if negotiations for a successor agreement had not been successfully completed by that date, the contract would continue until either party gave a fifteen day notice of termination. *Id.* By November 30, 1981, the negotiations with the Laborers reached an

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[8] The NLRB's most recent standard is described in *Dubuque Packing Co., Inc.*, 303 NLRB #66 (1991). That case, in turn, repudiated a number of tests set forth in a prior NLRB decision, *Otis Elevator*, 269 NLRB 891 (1984). These cases, in turn, follow this Court's landmark decision resolving some of the controversy surrounding this issue in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The 1981 bargaining reflects nothing more significant than a desire to avoid becoming embroiled in esoteric issues regarding the duty to bargain over a plant which had been closed for more than 20 months.

impasse. CP&P notified the Laborers that it was withdrawing recognition. J.A. 77 at ¶ 13.

CLPT asserts that this event terminated the obligation to contribute within the meaning of 29 U.S.C. § 1383(a)(1), triggering a complete withdrawal. CP&P maintains that the August 1979 complete cessation of covered operations was the withdrawal consistent with 29 U.S.C. § 1383(a)(2).

(2) The 1981 Operations.

It is clear in retrospect that had the status quo as it existed in November 1981 continued to the present, the case before this court would never have occurred. CP&P had not produced pipe at Shafter for at least 26 months and no contributions had been made for 19 months. The last CLPT contributions were made well before September 25, 1980, the date Congress enacted MPPAA.

The status quo did not continue. CP&P had been attempting to market its products and bid statewide. In November 1981, CP&P won a bid on two contracts resulting in the need to produce and deliver nearly 7,000 tons of concrete pipe near the Bakersfield, California area and very close to the site where the empty buildings which once constituted the Shafter Facility were located.

CP&P concluded that these contracts required a Southern California production site. Since the search for other sites in Southern California had proved unsuccessful, CP&P decided to create a production facility for the manufacture of concrete pipe at the previously abandoned Shafter Facility. Manufacturing equipment was hauled down from Sacramento, installed and the pipe was produced. None of this work was covered under the

union contract and no contributions were made. Subsequent to the date on which the job was completed, the facility shut down and the equipment was once again removed. CLPT claims this operation proves that the 1979 closure was not "permanent" within the meaning of 29 U.S.C. § 1383(a)(2).

G. The Withdrawal Liability Computation.

The methods for computing withdrawal liability are described in 29 U.S.C. § 1391. The only method applicable here is the presumptive formula described in 29 U.S.C. § 1391(b). First, the plan determines the unamortized amount of its unfunded vested benefits at various points in time. 29 U.S.C. § 1391(b)(1). Second, the plan determines the "employer's proportional share" of the unamortized amount of the change in the unfunded vested benefits during the specific time period. 29 U.S.C. § 1391(b)(2). The percentage resulting from this calculation is then applied against the sum resulting from the first calculation and the product is the amount CLPT charges as withdrawal liability.

(1) Calculating the Unfunded Vested Benefits.

CLPT should have no unfunded liability since no employee has been guaranteed or assured any minimum level of benefits. This fact was ignored by CLPT, which calculated withdrawal liability as if the level of benefits established in 1980 were guaranteed. In effect, this granted guaranteed benefits to the employees, a right they never achieved through collective bargaining.

a. The Actuarial Assumptions, Generally.

Computation of the unfunded vested benefits component of the withdrawal liability formulation is an actuarial process. The actuary determines the value of nonforfeitable benefits under the plan. 29 U.S.C. § 1393(c). CLPT's actuaries must use assumptions and methods which in the aggregate are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan. 29 U.S.C. § 1393(a)(1); 26 U.S.C. § 412(c)(3).

The statute contemplates issuance of regulations by the Pension Benefit Guaranty Corporation ("PBGC") identifying those assumptions which are reasonable for purposes of the calculation. *See* 29 U.S.C. § 1393(a). The PBGC has never issued those regulations.

b. The Interest Rate Assumption.

The actuarial assumption with the greatest impact on the value of "unfunded vested benefits" is the interest rate or discount rate assumption. Plan assets exist in the present, yet the payment of benefits occurs over time in the future. The interest rate assumption is the mechanism by which the comparison between the present value of plan assets and the value of vested liabilities is made possible. The interest rate assumption should represent the rate at which plan assets will grow over time. Actuaries speak of a "range of reasonableness" for this assumption.

CLPT, here, uses a blended interest rate consisting of the PBGC published rates for single-employer plan terminations for the month of withdrawal to the extent that

assets are presently available and the plan's funding rate of 6% to the extent that vested liabilities exceed assets. J.A. 246. The relationship between changes in the interest rate assumption and the impact on withdrawal liability is not proportional, but the impact is extremely significant. *See Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F.Supp. 641, 675 (N.D. Ill. 1986) (decrease of 3.25% in the interest rate assumption resulted in a 26% increase in employer withdrawal liability. *Id.* at 675).

CLPT's actuary admitted that the 6% rate is on the conservative end of the reasonable range. J.A. 254. If CLPT used the Buck Forward Rates (based on the most conservative investments, U.S. Securities), withdrawal liability drops to approximately $44,000. CP&P Ex.16B, J.A. 372-374, 284. Had it applied the PBGC approved rate of 9.25%, the withdrawal liability would have been reduced from approximately $190,000 to approximately $145,000. CP&P Ex.16D, J.A. 376-377, 284.

There are other factors which play a role in the selection of actuarial interest rate assumptions. The actuary is hired by the plan's fiduciaries. As noted above, the collective bargaining parties establish the employer rate of contribution but the trustees set the benefit levels. CLPT adopted massive increases in the level of benefits, and shortened the vesting schedule. *See Ponce, supra*, 582 F. Supp. 1310, *aff'd*, 774 F.2d 1401 (9th Cir. 1985). CLPT's actuary testified that the 6% interest rate assumption was on the lower end of reasonable and was selected, in part, to fund future benefits increase. J.A. 222-223, 254. The range of reasonableness on the interest rate assumption may be the difference between a plan with no unfunded liability and a plan which is as severely underfunded as CLPT claims. J.A. 288.

(2) Calculating the Employer's Proportional Share.

The employer's "proportional share" is computed in a fraction where the withdrawing employer's contributions to the plan over the five-year period ending at withdrawal is the numerator, and all employers' contributions to the plan during the same time period is the denominator. *See* 29 U.S.C. § 1391(b)(2)(E).

The legislative history is of little help in determining why Congress decided to use a fraction describing the employer's percentage *contribution* to plan assets as a basis for determining the employer's "proportionate share" of plan *liabilities* on withdrawal. Curiously, under this formula, those who pay the highest rate of contribution for their employees (and are more likely paying for full funding) will be the very ones who must pay the highest withdrawal assessment. Indeed, the selection of this formula is peculiar given that a Senate Subcommittee had concluded that, on average, only 8% of those on whose behalf contributions are made ultimately become vested in a pension benefit. *See Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 543 (9th Cir. 1980); *Ponce, supra*, 774 F.2d at 1403, citing "Interim Report of Activities of Private Welfare and Pension Study, Subcommittee on Labor," U.S. Senate Committee on Labor and Public Welfare (1971).

H. Arbitration Presumptions.

CLPT issued its withdrawal liability demand on January 20, 1982. J.A. 90-95. The worksheet for estimating withdrawal liability was attached to that letter. J.A. 93-94. CLPT demanded withdrawal liability in the amount of

$268,168.81.[9] The book value net worth of CP&P at the end of the year in which withdrawal liability was demanded was $417,656.58. J.A. 126, Ex. E-2 to R. 49.

The arbitration was bifurcated and conducted during 1987 and 1988. The 1987 hearing dealt with the date of withdrawal issue. The parties agreed that if withdrawal was triggered by the cessation of covered operation, which occurred before September 26, 1980, CP&P had no withdrawal liability. CLPT argued that the 1979 closing was "temporary." The arbitrator applied the 29 U.S.C. § 1401(a)(3)(A) presumption and resolved this issue against CP&P. The 1988 hearing litigated whether CLPT made errors in the withdrawal liability computation. The arbitrator applied the 29 U.S.C. § 1401(a)(3)(B) presumption. CLPT won again although withdrawal liability was reduced.

In September 1988, CP&P filed its claim under 29 U.S.C. § 1401(b) to vacate the arbitration decision. J.A. 403-408. On July 5, 1989, the District Court issued its final order. J.A. 416-427. Judge Hupp declined to find the act unconstitutional and affirmed the arbitrator's decision in its entirety. *Id.* CP&P appealed and the United States Court of Appeals for the Ninth Circuit affirmed in an

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[9] The Arbitrator held that the original withdrawal liability calculation improperly included contributions from Cen-Vi-Ro for purposes of determining CP&P's liability. Removing these contributions from the calculations reduced CP&P's percentage of the unfunded "vested" liabilities and the amount of withdrawal liability awarded was then reduced to $190,465.57. J.A. 393, 402. The District Court affirmed and CLPT did not appeal this issue to the Ninth Circuit. The withdrawal liability in this action is therefore $190,465.57.

unpublished memorandum decision and denied the petitions for rehearing and rehearing *en banc*. J.A. 431-433.

V.

SUMMARY OF ARGUMENT

CP&P mounts a three-part attack on the constitutionality of MPPAA. First, the statute is arbitrary and irrational and violates substantive due process rights of CP&P as applied. Second, the concerns expressed in the concurring opinion in *Connolly, supra*, 475 U.S. 211, are present and the statute constitutes an uncompensated taking in violation of the Fifth Amendment, as applied. Third, the statutory presumptions favoring multiemployer plans contained in 29 U.S.C. § 1401 are unconstitutional on their face and as applied to CP&P here because they deny CP&P access to an impartial decision maker.

A. The Substantive Due Process Violation.

Congress adopted MPPAA with the goal of charging the cost of funding benefits promised to a withdrawing employer's employees to that employer at the time of withdrawal. If one followed Congress's objectives in this case, no withdrawal liability would be imposed on CP&P. Neither the union contract nor the trust agreement promises any certain level of pension benefits to CP&P employees. Based on this discrepancy alone, the statute is irrational because it compels CP&P to pay sums in addition to its hourly contribution for benefits which were never promised to its employees. As importantly, CP&P contributed to the CLPT for less than one-third the time

required for any of its employees to obtain vested benefits under the Plan. CP&P should owe no withdrawal liability.

The statutory formula erroneously results in liability because it assumes that there is a proportional relationship between the amount of money an employer *pays into* the pension plan as contributions and the amount of vested *liability* it leaves behind. The formula ignores the impact of the 10-year vesting schedule and the exclusion rate.[10] CP&P contributed to the plan as though 100 percent of its employees would become vested, when, in reality, few might vest, and none in fact could based solely on employment with CP&P.

B. MPPAA Unconstitutionally Takes CP&P's Property as Applied.

MPPAA withdrawal liability provisions constitute a taking without just compensation in violation of the Fifth Amendment as applied. The effect of MPPAA as applied to CP&P is that CLPT is empowered, by operation of law, to seize assets constituting forty-six percent of CP&P's book value net worth for the purpose of funding a level of pension benefits to employees of other employers which was never promised by CP&P. MPPAA would be an improper taking without just compensation in violation of the Fifth Amendment even if it were prospective only. The fact that the statute operates retroactively here magnifies the "Takings Clause" defect.

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[10] The exclusion rate is the percentage of those participants on whose behalf contributions are made who nonetheless never receive a pension benefit due to forfeitures under the plan rules. *See Ponce*, 582 F.Supp. at 1313-1314.

C. The Procedural Due Process Violation.

Finally, the dispute resolution mechanisms of 29 U.S.C. § 1401 deprived CP&P of an impartial decision maker because the presumptions favor the plan trustees who have both structural and actual bias. This bias militates in favor of keeping the withdrawal liability assessment as high as possible. On the face of this statute, this process denies access to an impartial decision maker. As applied to CP&P, the statutory presumptions render the dispute resolution mechanism largely a futile pursuit because the presumptions as applied to the plan's various decisions are effectively unreviewable under the statutory standards.

VI.

ARGUMENT

A. Introduction.

CP&P recognizes that MPPAA comes to the Court with a presumption of constitutionality and that CP&P bears the burden of proving that the statute violates due process as applied and/or constitutes an improper taking without just compensation as applied. *See, e.g., PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). CP&P is prepared to shoulder this burden.

The journey to determine the constitutionality of the statute as applied must inevitably take the Court into the inner workings of the Respondent multiemployer "Taft-Hartley" pension plan as it in fact operates in contrast to the way it should operate. Application of ERISA and MPPAA to CP&P by the lower courts results in requiring CP&P to tender over $190,000 plus interest to CLPT for

the sole purpose of protecting the PBGC from having to pay off on the pension insurance.

It cannot be reasonably disputed that the money sought from CP&P is "property" under accepted constitutional definitions. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969). The physical, tangible assets owned, possessed, and used by an employer in the operation of its business are "sufficiently bound up with the reasonable expectations of [the employer] to constitute 'property' for Fifth Amendment purposes." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978). Such assets, whether in the form of liens, trade secrets, or cash are recognized as property by opinions of this Court. E.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-1004 (1984) (recognizing a Taking Clause property interest in trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 164 (1980) (expressly stating that, for Taking Clause purposes, "[t]he principal sum deposited in the registry of the court plainly was private property" *Id.* at 160); *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 148 (1953) ("[s]o long as a railroad is not caused by such regulations *to lose money on its over-all business*, it is hard to think that it could successfully charge that its property was being taken for public use 'without just compensation'." *Id.* at 148) (emphasis added).

"Property" may take the form of trade secrets, or may be in the form of money, as in *Webb's Fabulous Pharmacies* and *Baltimore & Ohio Railroad*. Whatever the form, these assets are property, with respect to which their owners exercise "the right to *possess, use* and *dispose* of [them]," *Monsanto, supra*, 467 U.S. at 1003, quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377-378

(1945) (emphasis added), as well as the right to exclude others from their possession, use, or disposition. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) ("right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176).

The required transfer of property under MPPAA from a withdrawing employer to a multiemployer trust has previously been addressed by this Court in facial challenges. *See PBGC v. R.A. Gray & Co., supra*, 467 U.S. 717, and *Connolly v. PBGC, supra*, 475 U.S. 211. Each of these challenges was unanimously rejected; however, a well-reasoned concurring opinion in *Connolly* recognized that the actual application of MPPAA may violate the Fifth Amendment rights of some employers. All of the possible infirmities cited in the concurring opinion, plus a few additional factors, are present in this "as applied" case.

Both *Gray, supra*, and *Connolly, supra*, discussed standards previously applied in substantive due process and takings cases. Specifically, the Court analyzed the cases under both an "arbitrary or irrational" standard and the three-part "Takings" analysis stated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). No definitive determination of whether one analysis is more appropriate than the other is apparent in these decisions. Resolution of that issue is not necessary here since the application of MPPAA to CP&P violates the Fifth Amendment under either standard.

CP&P also challenges the MPPAA dispute resolution mechanism as a denial of procedural due process on its face and as applied here. The constitutional issues associated with the 29 U.S.C. § 1401 (1980) presumptions were

fully briefed and argued to the Court in the 1987 facial challenge to the statute, resulting in an affirmance by an equally divided court. *PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987). CP&P contends that the statute is unconstitutional on its face and as applied here, and accordingly the presumptions should be stricken.

The starting point for this analysis is the goal Congress attempted to achieve with MPPAA and a comparison of that goal with the means used to attempt to achieve it.

B. The Congressional Goal.

The purpose of the pension funding provisions of ERISA is well-chronicled in the Court's decisions. *See Connolly v. PBGC, supra*, 475 U.S. 211 (*"Connolly"*); *PBGC v. R.A. Gray & Co., supra*, 467 U.S. 717 (*"Gray"*); *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980) (*"Nachman"*). The Court has noted:

> Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he will actually receive it.'

Connolly, 475 U.S. at 214. An integral part of the benefit protection was the creation of a wholly owned government corporation, the Pension Benefit Guaranty Corporation ("PBGC"), to administer the insurance program for participants of single employer and multiemployer pension plans. *Id.* at 214; 29 U.S.C. § 1302 (1989). PBGC coverage of multiemployer plans like CLPT was initially delayed for a number of years due to concerns that mandatory benefit guarantees by PBGC might induce several

large plans to terminate, thus subjecting the PBGC insurance system to liability far beyond its means. *Connolly*, 475 U.S. at 215.

If PBGC insurance was intended to encourage plan fiduciaries to act more responsibly and conservatively in adjusting benefits and managing plan assets, the statute had the opposite effect. Two-thirds of all multiemployer plans surveyed by the PBGC increased the value of benefits in the months before MPPAA became effective with nearly half increasing retiree benefits also. *See* G.A.O./HRD 85-58, Comptroller General's Report to the Congress, Effects of the Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits, 43, App. I, Table 17, 18. CLPT's 235% increase in 1976 and additional 10% increase in 1980 was consistent with the G.A.O. study.

By 1978 Congress had recognized the enormity of the problem which it created. Through ERISA, Congress had effectively shifted the entire economic burden and risk of private pension plan underfunding to the federal government d/b/a the PBGC. Congress responded to this crisis by directing the PBGC to make a report analyzing the problems of multiemployer pension plans and recommending possible solutions. *See* S. Rep. No. 95-570, pp. 1-4 (1977); H.R. Rep. No. 95-706, p. 1 (1977).

The PBGC's solution was a new set of rules, "under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation." *Connolly*, 475 U.S. at 216. Congress debated the withdrawal liability from 1979 through most of 1980. Indeed, the debate continued for several months following the date on which CP&P made its last contribution to CLPT. Ultimately, legislation became effective on September 26, 1980 in the

form of MPPAA which adopted the recommendations in the PBGC's report. *Connolly*, 475 U.S. at 217.

C. The Substantive Due Process Issue.

The Court described its framework for analyzing whether this statute is so arbitrary or irrational as to violate due process in *Gray, supra*, 467 U.S. at 729-730. Statutes adjusting the burdens and benefits of economic life are presumed to be constitutional, and CP&P has the burden of proving that Congress acted arbitrarily or irrationally. *Id.* at 729, quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

Congress does not, however, possess unlimited power to readjust rights and burdens and upset otherwise settled expectations. *Turner Elkhorn, supra*, 428 U.S. at 16-17. A legislature must do more than assert that contested law is for the public good to convert private property into public property without compensation. *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 1992 W.L. 142517, *11 (June 29, 1992). Furthermore, where legislation has a retroactive effect, the legislation must meet a higher burden than a statute with merely prospective impact. *Gray*, 467 U.S. at 730. The effect on CP&P here was quite clearly retroactive.

As recognized in *Connolly, supra*, 475 U.S. at 216, Congress enacted MPPAA to require withdrawing employers to fund the part of the plan's unfunded liabilities attributable to that employer's participation. Unfortunately, the formula adopted by Congress imposes liability on employers regardless of whether the plan's liabilities are attributable to the withdrawing employer.

CP&P did not promise any defined benefit to an employee and none of the unfunded liability is attributable to it. Rather, it is being compelled to tender its assets to CLPT for the benefit of the PBGC and employees of other employers. CP&P did not cause this liability. Rather, the liability, if it exists, was caused by CLPT's trustees and other employers (before CP&P started contributing and after it ceased). In essence, MPPAA, as applied, forces CP&P to pay the obligations of others in the hope that the PBGC can avoid liability for the guarantees and insurance provisions imposed upon it by the 93rd Congress. It is arbitrary and irrational to solve the PBGC's problem with CP&P's assets since there is no relationship between CP&P's conduct and any detriment to its employees. *See Connolly, supra*, 475 U.S. at p. 229 (O'Connor, J., concurring).

(1) There Are No Promised Benefits In This Plan To Protect.

The cornerstone of MPPAA is the protection of promised benefits yet there are no promised benefits in this case. The two key documents for this analysis are the collective bargaining agreements between CP&P and the Laborers, and the CLPT trust agreement.

CP&P's collective bargaining agreement limits its liability to $1.20 per hour worked and does not guarantee any of its employees a level of pension benefits on retirement. R. 124, CP&P Ex. 9, 1987 Arbitration Transcript p. 78. The CLPT trust agreement affirms that the employer's liability is limited to its contributions under the union contract and that no participant or beneficiary in the pension plan can or should have any expectation that any benefit level is guaranteed. J.A. 80-82.

Thus, if MPPAA had a purely prospective impact, its stated purpose would not justify the intrusion into CP&P's property interests because the ill which Congress sought to cure does not exist as there are no benefits promised to either CP&P's employees or to any other participant under the terms of the CLPT plan. On this basis alone, the statute should be stricken as applied to Petitioner here.

(2) The Statute is Arbitrary and Irrational Because CP&P's "Proportional Share" of the Liabilities Should Be Zero.

Under the best set of facts conceivable for CLPT, CP&P could not have contributed on behalf of any of its employees for more than three years. At the same time, CLPT had a ten-year "cliff" vesting schedule. The potential liability for those employees with less than ten essentially continuous years of service was not "vested liability." Under the circumstances, CP&P's withdrawal liability should be zero because none of its employees participated long enough to have any "vested service" attributable to employment at CP&P. Accordingly, CP&P's "proportional share" of unfunded vested liability is logically zero.

Nonetheless, MPPAA as applied here results in withdrawal liability of more than $190,000 even though CP&P already paid $102,656.68 for benefits which none of its employees received. The withdrawal liability calculation arbitrarily and irrationally results in an imposition of withdrawal liability on CP&P even though none of the stated purposes of MPPAA are served and none of the "evils" associated with employer withdrawal from multi-employer plans is present.

(3) The Withdrawal Liability Calculation Formula Is Also Arbitrary and Irrational As Applied.

One problem with the withdrawal liability statute as applied to CP&P is that the formula proceeds from a faulty premise linking contributions and vested liability. The premise is irrational as applied for two reasons. First, the formula fails to take into account the impact of normal exclusion rates and vesting schedules in Taft-Hartley pension plans on short-term employers like CP&P. Second, the more an employer contributes to CLPT to fund its employees' benefits, the more it must pay at withdrawal to fund benefits for employees of others.

The first flaw in using a contribution ratio to calculate a proportional share of liability is that it fails to take into account the impact of the vesting schedule. If, as here, an employer contributes for less than the number of years required for any of its employees to become vested in the plan, the plan's vested liabilities attributable to that employer should not increase because of that employer's conduct. Nonetheless, the MPPAA formula as applied here resulted in a substantial withdrawal liability assessment against CP&P.

The other peculiar characteristic of this formula, as applied, is that the more an employer contributes, the more withdrawal liability it owes if it withdraws. For example, CP&P contributed $102,656.68 during the five-year period ending December 31, 1979 at the rate of $1.20 per hour. J.A. 76 at ¶10. Its percentage of total CLPT contributions for the period ending December 1979 was therefore .000375276. CP&P Ex.16(B), J.A. 372-374, 284. Had CP&P, through unsuccessful bargaining or a weak negotiating position, been compelled to pay twice that

amount, i.e., $2.40 per hour, its withdrawal liability percentage doubles from .000375276 to .000750271.[11] Application of this fraction to the pension fund's pre-MPPAA aggregate unfunded vested liability of $468,656,500[12] would cause the CP&P withdrawal liability assessment to increase from $175,875.56 to $351,619.38. Thus, had CP&P doubled its hourly contribution and improved the plan's assets-to-liability ratio, its reward would be a demand to double its withdrawal liability![13]

The withdrawal liability calculation formula as applied punishes those employers who increase their contributions to the plan by making it even more expensive to withdraw from the plan even though the effect of the contributions has been to increase assets without increasing liabilities. The "more you pay the more you owe" approach which results from the withdrawal liability formula is not consistent with requiring an employer to pay only its fair share of the vested liability at withdrawal. By requiring CP&P to pay more than its fair share, the formula requires CP&P to pay liabilities of other employers so that other citizens (employees of other employers) can receive retirement benefits. There is

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[11] This number is derived by dividing $205,313.36 into $273,652,356.68, i.e. CP&P's contributions and the aggregate contributions on behalf of all employers are increased by exactly $102,656.68 from what actually occurred.

[12] This number is for the December 1979 unfunded liability pool only. *See* J.A. 94-95, Ex.D. to R. 49.

[13] Petitioner recognizes that the $102,656.68 additional contribution would have some effect on the value of the unfunded vested benefits but it would not materially affect the resulting liability.

no rational basis to require one citizen to fund the pension of another citizen where no relationship between the two ever existed.

(4) The Statute is Unfairly Retroactive as Applied.

The portion of the withdrawal liability attributable to the unfunded liability of the plan prior to the effective date of MPPAA is unquestionably retroactive as applied to Petitioner. The one-half billion dollar unfunded liability is largely attributable to the 1970 breach of fiduciary duty described in *Ponce, supra*, 774 F.2d 1409, and the trustees' 1976 decision to reduce the required number of years before a participant vested in the plan from 15 years to 10 years.

The gross benefit increase of 235% increase in 1970 (pre-CP&P) and additional 10% increase in 1980 (post-CP&P) were significant in creating the unfunded liability. These increases applied to both active and retired participants without regard to employer funding. The result was a massive decrease in the assets-to-liability ratio in the plan which occurred before and after CP&P contributed to the plan. Assessing CP&P for the alleged liability resulting from events before it entered the CLPT is not only retroactive but also compels this employer to pay for pensions of employees wholly unrelated to it.

Also, CP&P closed its plant, laid off its employees and made its last contribution to CLPT prior to the passage of MPPAA. By these actions it had committed to a course of action that resulted or should have resulted in withdrawal before the passage of MPPAA. The subsequent application of MPPAA to these facts indisputably constitutes a retroactive application of the statute to CP&P. Since a retroactive statute must meet a higher

burden than a statute with merely prospective impact, *Gray, supra*, 467 U.S. at 730, this statute, as applied, falls well below the minimum due process requirements imposed by the Fifth Amendment.

D. The Withdrawal Liability Assessment is a Taking as Applied.

CP&P also challenges the withdrawal liability assessment on the grounds that MPPAA perpetrates an uncompensated taking against Petitioner in violation of the Fifth Amendment. Uncompensated expropriation of private property for public use has been held unconstitutional in a variety of contexts. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (use of landlord property for attachment of cable television lines is compensable taking); *Webb's Fabulous Pharmacies, supra*, 449 U.S. at 163 (Florida's appropriation of interest on monies deposited with the registry of the court was a compensable taking); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (President's seizure and operation of a coal mine constituted a compensable taking).[14]

The constitutional infirmity is not avoided by legislation directing CP&P to deliver its money to CLPT. In fact

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[14] It should be noted that takings have frequently been found in contexts in which the property in question has been subject to substantial prior regulation, as in the area of security interests. *E.g., Armstrong v. United States*, 364 U.S. 40 (1960) (taking of materialman's lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (taking of mortgagee rights in property held as security); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (mining rights). Prior regulation cannot justify subsequent legislation which rises to the level of taking without just compensation.

it is impermissible for legislation to require the delivery of one person's property to another person without a justifying public purpose even if compensation is paid. The Court has stated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) as follows:

> To be sure, the Court's cases have repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." (Citations omitted.). . . .

As the Court noted in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), although property may be regulated to a certain extent, if the regulation goes "too far," it is a taking.

(1) The *Lucas v. South Carolina Coastal Council* Analysis.

More recently, the Court recognized that the cases since *Mahon* have offered little insight as to when and under what circumstances a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 1992 W.L. 142517, *6 (June 29, 1992). Subsequent to *Mahon*, "[the court had] generally eschewed any 'set formula' for determining how far is too far, preferring to 'engage in . . . essentially *ad hoc*, factual inquiries.' " *Id.*

The Court in *Lucas* noted that there were "at least" two discrete categories of regulatory action which were compensable takings without case-specific inquiry into the public interest advanced in support of the restraint. *Id.* Both of these categorical takings apply in the context of disputes over the use of real estate or real property. The Court's notation that it had described "at least two

discrete categories of regulatory action as compensable without case-specific inquiry" suggests that its decision in *Lucas* may be applicable beyond the relatively narrow area of land-use regulation.

(2) The *Connolly v. PBGC* Analysis.

In *Connolly, supra*, 475 U.S. 211, the Court reaffirmed that it has not established any set formula for identifying a "taking" forbidden by the Fifth Amendment, and has relied instead on *ad hoc*, factual inquiries into the circumstances of each particular case. *Id.* at 224. The Court identified three factors which were of "particular significance" in determining whether an uncompensated taking in violation of the Fifth Amendment had occurred. Those factors are:

(1) The economic impact of the regulation on the claimant;
(2) The extent to which the regulation has interfered with distinct investment-backed expectations; and
(3) The character of the governmental action.

Id. at 225, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The concurring opinion in *Connolly* suggests that a regulation that completely deprives a withdrawing employer of its property to fund pension benefits for employees of other employers without regard to the withdrawing employer's conduct may be an additional category where compensation for the taking is required. *Connolly*, 475 U.S. at 228-236.

Given the recency of the *Lucas* decision and the uncertainty regarding its application to this case, CP&P will analyze the Takings Clause under both the *ad hoc* factors which this Court noted in *Connolly*, and the *Lucas* categorical approach.

(3) The Withdrawal Liability Statute as Applied to CP&P Constitutes a Taking Based on the *Ad Hoc* Factual Analysis.

Much of the legal analysis required to examine this case under the *ad hoc* factual approach to the Takings Clause issue was performed by this Court in *Connolly*. The primary difference is that in *Connolly* the Court was examining whether the statute would constitute a taking in all circumstances. Here, however, the issue is whether the statute constitutes a taking as applied to CP&P.

a. The Economic Impact of the Regulation on Petitioner.

The economic impact of the withdrawal liability assessment on CP&P is devastating. CP&P's shareholder equity at the end of the year of withdrawal was $417,656.58. J.A. 126. The withdrawal liability assessment of $190,465.57, J.A. 393, 402, represents approximately 46% of that equity. This is an extremely severe impact.

The withdrawal liability assessment here is made without regard to the relationship between CP&P and CLPT. CP&P had no managerial responsibility for this plan. None of its employees vested because of their service with CP&P exclusively. The unfunded vested liability was caused by benefit increases and changes to the vesting schedule which occurred prior to CP&P's creation and well after the date on which the last contribution by this employer was made to the plan in 1980. This factor weighs heavily in favor of CP&P.

b. Interference With Distinct Investment Backed Expectations.

This factor also heavily favors the finding of a "taking" as applied here. CP&P's reasonable investment backed expectations were described in the union contract and trust agreement. Both documents stated that CP&P's obligation to contribute under the union contract was the extent of its obligation to fund pension benefits and that obligation was limited to funding pensions for its own employees. Indeed, the trust document itself described the plan as being a defined contribution plan to which no withdrawal liability could ever be imposed. It was not until well after CP&P's 1979 complete cessation of covered operations that this Court issued its decision in *Nachman, supra,* 446 U.S. 359, in which the defined contribution status of this plan became questionable.

The employees, through their union, and the employer entered into a contract through which CP&P would pay $1.20 of the total compensation package to CLPT. CP&P made no promises of specific benefit to its employees. In reliance on this agreement, CP&P priced its goods – concrete pipe – and sold those goods to recover the total cost of labor and earn a competitive profit. CP&P reasonably expected that these transactions were final. The employees had no reasonable expectations to the contrary. The payment of $1.20 per hour to CLPT was the entire extent of the agreement regarding pensions.

MPPAA effectively re-opened the negotiations, retroactively established promises of benefits where none had previously existed, and increased CP&P's labor cost retroactively on contracts CP&P performed in the past. When CP&P closed the plant in 1979 MPPAA did not exist. The ERISA contingent liabilities were substantially

different in scope from the liabilities of MPPAA so that CP&P had no reasonable notice that 46% of its net worth would be seized. CLPT never failed to pay any recognized benefits when due and its assets continued to grow. J.A. 79 at ¶26; J.A. 342-343. Any risk of a liability under pre-MPPAA ERISA was extremely remote. This remote contingency certainly did not put CP&P on notice that withdrawal might result in seizure of nearly half its net worth.

c. Character of the Governmental Action.

The property of CP&P which is taken, is taken in its entirety. The withdrawal liability scheme, as this Court has observed, was enacted because the PBGC insurance program created by ERISA in 1974 encouraged withdrawals which threatened to foist on the PBGC liability in excess of its resources. Thus, Congress enacted the withdrawal liability scheme as a direct effort to shift the funding liability for the private pension insurance system from the PBGC to withdrawing employers. The liability assessed here is pension liability for employees of entities other than CP&P. The vast majority of the unfunded liability was created before CP&P's creation, and no CLPT employee participated long enough to vest based upon employment at CP&P.

Consider the case of the CLPT participant who retired in 1969 with thirty years of vested service. At retirement, the gross annual pension liability to him was $4,950.00 (30 x $13.75[15] x 12). After the 1970 benefit increase the liability for this retiree jumped to $11,664.00

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[15] *See, Ponce,* 582 F.Supp. at 1314.

based on the same formula. The 1976 change to the vesting schedule increased the number of individuals like this sample retiree. In 1980, after CP&P made its last contribution the benefits were again increased by CLPT trustees and the gross benefit for this retiree jumped to $12,830.40. Because this participant was retired, no additional contributions were received by CLPT based on hours he worked. Thus, for each similarly situated retiree (and the number of years those retirees receive benefits) the trustees of CLPT have created additional liability at the rate of $7,880.40 per year with no additional funding.[16] CP&P did not exist when these participants earned their service credits and did not make the decision to increase benefits or select those that did.

Thus, the statute, as applied, takes CP&P's assets and compels it to be paid into CLPT for the sole purpose of protecting the PBGC from being forced to honor its pension insurance. This kind of shifting of a public burden to a private entity is precisely the kind of legislation which the Takings Clause was designed to preclude.

Each of the concerns expressed in the concurring opinion in *Connolly*, are present in this case. Application of the three factor *ad hoc* factual approach in *Connolly* to the circumstances in this case demonstrates that ERISA and MPPAA cause an uncompensated taking in violation of the Fifth Amendment as applied to CP&P.

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[16] The magnitude of the impact of these benefit increases was far greater than even this example suggests. It must be remembered that all vested service of all participants in the plan was increased.

(4) The Categorical Taking.

In *Lucas v. South Carolina Coastal Council, supra*, the Court described at least two discrete categories of regulatory action which were, by definition, compensable takings which did not require a case-specific inquiry into the public interest advanced in support of the restraint. Unlike *Lucas*, this case deals not with real property but rather with economic regulation.

Lucas is instructive. In fact, CP&P finds itself in a worse position than Mr. Lucas vis-a-vis the impact on property. Lucas complained that the land-use regulation deprived him of all reasonable uses thereby stripping all economic value from the property. Here CP&P is to be deprived of approximately 46% of its book net value permanently and without any compensation. Had the statute in *Lucas* been upheld, the landowner could still have built a patio and walkway, and enjoyed the view from his beach. Here, if the statute is upheld, CLPT seizes the assets and CP&P retains no property interest in the seized assets.

The taking here goes beyond that found unconstitutional in *Lucas*. As the Court noted, the fact Congress claimed a taking was for the public good does not make the taking any less unconstitutional. The harm here also goes beyond that of CP&P's shareholders. The taking in *Lucas* was personal to the landowner, but so too was the scope of the injury. Forced liquidation of CP&P's assets and payment of the proceeds to CLPT to fund pensions for employees of others impacts the current Sacramento employees of CP&P. If the assets are seized and the remaining plant closed it will be of little solace that their jobs and income were lost for the "public good" of protecting the PBGC and funding the pensions of others who

live hundreds of miles south. MPPAA, as applied, inflicts far too much havoc and takes too much from too many to be anything other than a taking requiring compensation under the Fifth Amendment as applied to CP&P.

E. The Statutory Presumptions Violate the Due Process Clause by Denying Access to an Impartial Decision Maker.

Those acting in judicial or quasi-judicial capacity are disqualified by their interest in the controversy from deciding the case. E.g., *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). Although each decision maker begins with an initial presumption of impartiality, that presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). CP&P bears the burden of rebutting this presumption, but that burden is carried if it proves that the CLPT trustees are potentially subject to disqualifying interest. CP&P is not required to prove the decision maker was actually biased. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

The disqualifying interest can be directly pecuniary. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). It can also occur where a quasi-judicial function is combined with statutory duties to create a "possible temptation" for the decision maker to decide a question based on the bias rather than the facts. *See Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

The statutory presumptions contained in 29 U.S.C. § 1401 deny CP&P and all withdrawing employers the right to procedural due process in the form of an impartial decision maker. There is no neutral and detached

judge in the first instance, a constitutional infirmity recognized by the Court in *Ward, supra*, 409 U.S. at 61-62. The presumptions also preclude the possibility for a *de novo* review by an impartial and disinterested panel, an omission which the Court implicitly condemned in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-248 (1980).

(1) CLPT Trustee Bias is Structural and has Manifested Itself on Several Occasions in This Case.

The existence of trustee bias in the withdrawal liability dispute mechanism is structural and its impact is easily identified in this case. Both under Section 302 of the Taft-Hartley Act and ERISA the fiduciaries owe an unwavering duty of complete loyalty to the beneficiaries of the trust to the exclusion of all interests of all other parties. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); 29 U.S.C. § 1104. The ERISA fiduciary duty is even more exacting than the requirements of the common law of trusts relating to employee benefit plans. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985). Indeed, the trustees are personally liable to the fund for a breach of the statutory fiduciary obligations. 29 U.S.C. §§ 1109 and 1132.

It is significant that the employer trustees of the fund, in addition to their capacity as fiduciaries, are competitors of withdrawing employers like CP&P. The Court has held that employee benefit contributions can be inappropriately used in multiemployer plan situations to achieve unlawful anti-competitive goals. *See United Mine Workers v. Pennington*, 381 U.S. 657, 665-666 (1965).

CLPT's employer-appointed trustees have an interest in forcing competitors to incur the cost of contribution to the pension trust. It is also in their best interest to fund

the trust from the assets of withdrawing employers so that no unfunded liability will exist should their business later withdraw. The union trustees' interests are contrary to allowing employers to withdraw from the plan. Clearly, the specter of enormous liability is a deterrent to pushing the employer's bargaining position. The union, the continuing employers and the CLPT trustees benefit from actuarial assumptions which maximize withdrawal liability. J.A. 290.

The plan actuary serves at the tolerance of the plan trustees. Actuaries recognize (as the actuary for CLPT recognized) that the trustees tend to increase benefits regardless of changes in the level of contributions. Actuaries select extremely conservative interest rate assumptions which tend to maximize the apparent unfunded liability to deal with this contingency.

The fiduciary's obligations virtually guarantee that the trustees will exercise every opportunity to maximize the assets available to the pension plan including maximizing the recovery of withdrawal liability. The legislative history demonstrates this point through statements by Senator Harrison Williams, co-sponsor of ERISA and MPPAA:

> We do not intend to restrict plan sponsor's prudent exercise of judgment in administering the withdrawal provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable cost. 126 Cong. Rec. 23,288 (1980).

Congress believed that the failure to maximize withdrawal liability was not a *per se* violation of fiduciary

duty.[17] However, the fact that it can be a violation of the fiduciary duty, at all, destroys any neutral or detached quality to the fiduciary decision making.

CLPT's trustees have demonstrated their bias in this case. CLPT's actuary testified that the interest rate assumptions are deliberately conservative (thereby maximizing withdrawal liability) with the goal of funding future benefit increases for participants in the plan. J.A. 222-223. CLPT tried to inject the contributions history of a completely separate employer, Cen-Vi-Ro, into CP&P's contribution base for the deliberate purpose of increasing the amount of withdrawal liability. Indeed, the 1980 benefit increase was directly at the withdrawing employer's expense. The CLPT trustees' bias cannot be seriously disputed in this case particularly since CP&P did not even have the minimal protection of membership in any of the employer associations which select the CLPT trustees.

(2) The Statutory Presumptions of Fiduciary Infallibility Provide the Mechanism for the Trustees to Effectuate Their Bias.

The three presumptions in the dispute resolution process[18] when coupled with the subject matter inherent in withdrawal liability calculation imbue the trustees with the virtually irresistible power to bring their bias to bear on withdrawing employers. Under the first presumption, 29 U.S.C. § 1401(a)(3)(A), the trustees' determination regarding the date of withdrawal was presumed correct

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[17] H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 67, reprinted in 1980 *U.S. Code Cong. & Admin. News* 2918, 2935.

[18] *See* 29 U.S.C. § 1401(a)(3)(A), (a)(3)(B) and (c).

unless CP&P was able to prove by a preponderance of the evidence that the determination was unreasonable or clearly erroneous. Thus, CLPT was permitted to have its clairvoyance on whether the 1979 cessation of operations was "permanent" upheld as fact. The CLPT ignored a plant closure which would otherwise have triggered withdrawal until such time as the trustees decided that it suited their purpose to impose the liability. They did so in this case in such a fashion as to drag CP&P from the pre-MPPAA era across time and past the effective date of the statute to a point where withdrawal liability could be imposed.

Under the second presumption, 29 U.S.C. § 1401(a)(3)(B), the plan's determination of its own unfunded vested benefits is correct unless the withdrawing employer can prove that the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable, or that the plan's actuary made a significant error in applying the actuarial assumptions or methods.

Here, it is the combination of the range of permissible activity coupled with the presumption which effectively precludes any review of the unfunded vested benefit calculation. As demonstrated both in *Keith Fulton*[19] and Exhibits 16A through D in the arbitration[20], the range of actuarial assumptions which may be potentially reasonable results in wide swings in the withdrawal liability.

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[19] *See Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1137, 1150 (1st Cir. 1985). (Aldrich, J., dissenting.)

[20] J.A. 371-377.

Given the trustees' bias in favor of maximizing plan assets, it is not difficult to understand why CLPT's trustees' actuary admittedly fixed actuarial assumptions on the conservative end of the spectrum. J.A. 222-223. When an actuarial firm so dominates the market in serving multiemployer plans that it boasts that, in that particular market for services, it is first and "no one is second," the withdrawing employer's task is rendered impossible. J.A. 255. The plan proclaims its assumptions to be within the range of reasonableness and verifies this fact by opinion testimony from its paid actuary who claims that most actuaries in the field (i.e. those employed by the same firm and those which defer to it) agree his assumptions are reasonable. Absent a soul cleansing confession by the actuary (which would likely result in the termination of his contract), attack on the actuarial assumptions is virtually impossible.

The third presumption effectively seals the withdrawing employer's fate. Under 29 U.S.C. § 1401(c) after the arbitrator has applied the presumptions described above, the District Court will find that the employer failed to meet his burden of proof in overcoming the presumption unless a clear preponderance of the evidence is to the contrary. The withdrawing employer is left to ponder the 20th Century equivalent of the Sphinx's riddle (the meaning of the term "clear preponderance of the evidence"), uncertain of its meaning but clearly understanding that the burden imposed will be insurmountable. CP&P never had a fair hearing before a decision maker which was not directly biased against it.

(3) CLPT's Decision in Computing, Assessing and Collecting Withdrawal Liability is Adjudicative in Nature.

Withdrawal liability is a debt which is a creature of the MPPAA. The unique feature of the statute is that the plan which seizes the employer's assets decides: (1) if it is underfunded, (2) whether CP&P owes the debt, and (3) how much the debt will be. CLPT performs all these functions cloaked in presumptions that its determinations are correct.

All of these decisions are conducted solely and exclusively for the purpose of bringing them forward in the dispute resolution mechanism to collect money from withdrawing employers either through voluntary payment or through the 29 U.S.C. § 1401 dispute resolution mechanism. But for the dispute resolution mechanism or the opportunity to invoke it, the computation of the debt would never occur.

The trustees in making this computation, are deciding the amount of the employer's "proportional share" or "fair share" of the plan's unfunded liability. This decision making process usually results in resolving all disputable issues. Assessment of liability is necessarily adjudicative.

(4) The Breadth of "Reasonable Actuarial Assumptions" Renders the Statutory Presumptions Unconstitutional.

The range of reasonable interest rate assumptions during the time period in question has been described by at least one actuary as being between 7.5 percent and 14.5

percent per year.[21] That "range," coupled with the incentive of all those on the CLPT side of this dispute to maximize withdrawal liability, render the statute unconstitutional because the range of acceptable actuarial assumptions coupled with the presumptions permits the seizure of assets when there may be no objective unfunded vested liability.

CLPT can manipulate the process to such an extent that neither the PBGC nor Congress may ever gain an objective assessment of the private pension plan funding system. For example, if the interest rate assumptions used by the plan are accepted, the Court must assume that the unfunded "vested" liability of this plan as of the last year prior to the effective date of MPPAA was approximately $468,656,500. J.A. 94. However, if the plan actuary had applied the "Buck Forward Interest Rates" which are based upon essentially zero risk U.S. government securities, the plan's unfunded vested liability for the December 31, 1979 withdrawal liability pool decreases by more than 38 percent and $179,870,318. Clearly, the Buck Forward Interest Rates do not approach the 14.5 percent rate which the actuary in *Keith Fulton* found reasonable. The important aspect of the interest rate flexibility is that fundamentally it is a matter of what one chooses to believe about future trends in investment performance. Beliefs protected by presumptions are effectively irrebuttable.

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[21] *Keith Fulton, supra*, 762 F.2d at 1150 (Aldrich, J., dissenting).

(5) The Statutory Presumptions Deprive Withdrawing Employers of Due Process Because They Never are Able to Obtain a Trial Before a Neutral and Detached Decision Maker.

Due process requires a neutral and detached judge in the first instance and even *de novo* review does not remedy the failure to provide such opportunity. *Ward, supra,* 409 U.S. at 60-61. The presumptions here are unique and do not deal with evidence but rather conclusions from evidence. Thus, they are not factual presumptions but rather presumptions of decision maker infallibility.

Congress was admittedly attempting to limit an employer's ability to defend itself against a withdrawal liability assessment. The withdrawal liability assessment was intended to be collectible upon notice and demand without prior hearing. H.R. Rep. No. 869, pt. II, 96th Cong., 2d Sess. 29, reprinted in *1980 U.S. Code Cong. & Admin. News 2993, 3018.* The requirement for interim withdrawal liability payments while the employer attempted to litigate the dispute is indicative of the "collect first and answer questions later" approach which Congress implemented.[22]

Thus, the statutory presumptions in MPPAA are not evidentiary presumptions but are instead presumptions regarding who makes better decisions. The problem is that the presumption that the plan makes better decisions, coupled with (1) the trustees' inherent bias and (2) the available mechanisms through which they can inflate with the unfunded liability calculation, have the inevitable effect of permitting CLPT to decide how much of an

[22] *See* 29 U.S.C. § 1401(d).

employer's assets it wishes to take without fear of close scrutiny on review.

The statutory presumptions go further than is necessary to achieve Congress' legitimate purpose of deterring frivolous litigation. The potential for interim withdrawal liability payments during the pendency of the dispute[23] is a significant deterrent to contesting a withdrawal liability assessment. Similarly, the knowledge that, if the employer loses, an award of attorneys' fees is virtually inevitable under 29 U.S.C. §§ 1132(g)(2) and 1451(b) and (e) is likewise a significant deterrent to either frivolous attacks or delaying tactics by the withdrawing employer. The addition of the statutory presumptions to preclude a fair opportunity for hearing is not necessary to achieve the Congressional purpose of deterring non-meritorious litigation and operates to the extreme prejudice of those employers who have legitimate grievances.

VII.

CONCLUSION

CP&P requests the Court to find that the imposition of withdrawal liability on CP&P constitutes arbitrary and irrational economic regulation in violation of the due process clause and/or a taking without just compensation in violation of the Fifth Amendment to the United States Constitution as applied. The Ninth Circuit Court of Appeals' decision upholding the imposition of withdrawal liability in this case should be reversed. CP&P also requests that the Court find that the presumptions

[23] *See* 29 U.S.C. § 1401(d).

contained in 29 U.S.C. § 1401 denied petitioner the procedural due process right to an impartial decision maker and reverse the Ninth Circuit on that basis.

DATED: July 10, 1992.

Respectfully submitted,

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APPENDIX

29 U.S.C. § 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section –

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted –

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

(Pub. L. 93-406, Title IV, § 4201, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1217.)

29 U.S.C. § 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall –

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

Pub. L. 93-406, Title IV, § 4202, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1218.)

29 U.S.C. § 1383. Complete Withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when a employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if –

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan –

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if –

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer –

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341 a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

(c) Entertainment industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B)(i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means –

(A) theater, motion picture (except to the extent provided in regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary –

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

(d) Other determinative factors

(1) Notwithstanding subsection (a) of this section, in the case of an employer who –

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

3) A withdrawal occurs under this paragraph if –

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either –

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial

institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessation by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operation ceased.

(5) If the corporation determines that the employer has no further liability under the plan either –

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under the paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules –

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

(Pub. L. 93-406, Title IV, § 4203, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1218.)

29 U.S.C. § 1387. Reduction or waiver of complete withdrawal liability; procedures and standards applicable

(a) The corporation shall provide by regulation for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from a plan subsequently resumes covered operations under the plan or renews an obligation to contribute under the plan, to the extent that the corporation determines that reduction or waiver or withdrawal liability is consistent with the purposes of this chapter.

(b) The corporation shall prescribe by regulation a procedure and standards for the amendment of plans to provide alternative rules for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan. The rules may apply only to the extent that the rules are consistent with the purposes of this chapter.

(Pub. L. 93-406, Title IV, § 4207, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1223.)

29 U.S.C. § 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan.

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of –

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for the plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending –

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which –

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of –

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's propositional share of the unamortized amount of a change in unfunded vested benefits is the product of –

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction –

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such a change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) an employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of –

(A) such unamortized amount; multiplied by –

(B) a fraction –

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan

years ending before September 26, 1980, by all employers –

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of –

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of –

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be

determined in a manner different from that provided in subsection (b) of this section.

(2)(A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of –

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction –

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) The denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of –

(i) an amount equal to –

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction –

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

(II) the denomination of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The corporation may by regulation permit adjustment in any denominator under this section consistent with the purposes of this subchapter, where such

adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of-

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction –

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4)(A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of –

(i) the plan's unfunded vested benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participant's service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying –

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction –

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction –

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to serve with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets under subparagraph (C) by a fraction –

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding

the plan year in which the employer withdraws and all the preceding plan years; and

(II) the denominator of which is the sum of all contrbutions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction –

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute

under the plan in the plan year preceding the plan year in which such employer withdraws is equal to –

(i) an amount equal to –

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to –

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to

the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5)(A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of the plan's unfunded vested benefits amount employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a

period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) of this section shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of Title 26, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c) of this section.

(2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the past plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following merger of multiemployer plans

In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) of this section shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

(Pub.L. 93-406, Title IV, § 4211, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1226, and amended Pub.L. 98-369, Title V, § 558(b)(1)(A), (B), July 18, 1984, 98 Stat. 899; Pub.L. 101-239, Title VII, § 7891(a)(1), Dec. 19, 1989, 103 Stat. 2445.)

29 U.S.C. § 1392. Obligation to contribute

(a) Definition

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising –

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

(Pub.L. 93-406, Title IV, § 4212, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1233.)

29 U.S.C. § 1393. Actuarial assumptions

(a) Use by plan actuary in determining unfunded vested benefits of a plan for computing withdrawal liability of employer

The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of –

(1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the

experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or

(2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

(b) Factors determinative of unfunded vested benefits of plan for computing withdrawal liability of employer

In determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part, the plan actuary may –

(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of Title 26 and reasonable estimates for the interim years of the unfunded vested benefits, and

(2) in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

(c) Determination of amount of unfunded vested benefits

For purposes of this part, the term "unfunded vested benefits" means with respect to a plan, an amount equal to –

(A) the value of nonforfeitable benefits under the plan, less

(B) the value of the assets of the plan.

(Pub.L. 93-406, Title IV, § 4213, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1233, and amended Pub.L. 101-239, Title VII, § 7891(a)(1), Dec. 19, 1989, 103 Stat. 2445.)

29 U.S.C. § 1397. Application of part in case of certain pre-1980 withdrawals; adjustment of covered plan

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution based units, of such employer properly allocable –

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a) of this section.

(Pub.L. 93-406, Title IV, § 4217, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1235, and amended

Pub.L. 92-369, Title V, § 558(b)(1)(A), (B), July 18, 1984, 98 Stat. 899.)

29 U.S.C. § 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall –

(A) notify the employer of –

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer –

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of –

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1) (A) (i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made of the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C) (i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of –

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 1385(a)(1) of this title shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 1385(b)(1)(B)(i) of this title.

(ii) (I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under the clause (i)) the average of the required employer contributions under the plan for the period of 3 consecutive plan years (during the period of 10 consecutive plan years ending with the plan year preceding the

plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.

(III) This clause shall not apply in the case of any withdrawal described in subparagraph (D).

(IV) If under a plan this cause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after September 26, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdrawal from the plan –

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 1385(a) of this title, the amount of each annual payment shall be the product of –

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 1386(a)(2) of this title.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment

shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means –

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules –

(A) are consistent with this chapter, and

(B) are not inconsistent with regulations of the corporation.

(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

(d) Applicability of statutory prohibitions

The prohibitions provided in section 1106(a) of this title do not apply to any action required or permitted under this part.

(Pub.L. 93-406, Title IV, § 4219, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1236, and amended Pub.L. 98-369, Title V, § 558(b)(1)(B), July 18, 1984, 98 Stat. 899.)

29 U.S.C. § 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of –

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that –

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer

without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

(Pub.L. 93-406, Title IV, § 4221, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1239.)

29 U.S.C. § 1451. Civil Actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except the State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action including, reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of –

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

(Pub.L. 93-406, Title IV, § 4301, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1263.)

Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

No. 91-904

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS
OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF ON THE MERITS BY RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW [1]

(1) Do the provisions of the Multiemployer Pension Plan Amendments Act violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied*, by retroactively imposing withdrawal liability on an employer who [alleges it][2] never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?

(2) Do the presumptions in 29 U.S.C. § 1401 favoring multiemployer plans like Construction Laborers Pension Trust for Southern California violate the due process rights of Concrete Pipe and Products by denying access to an impartial decision maker?

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[1] The petition for a writ of certiorari was granted limited to Questions 2 and 4 presented by the petition. Question 4 presented by the petition corresponds to Question 1 of this brief, and Question 2 remains Question 2. Respondent has changed the order of the Questions Presented to conform to the change made by Petitioner in its brief on the merits.

[2] Respondent proposes a modified Question 1 and objects to the formulation of Petitioner's version on the ground that it assumes facts not in evidence. Petitioner has not established that it "never had employees vested in the pension plan." It merely speculates that this is the case. "CP&P contributed to the plan as though 100 percent of its employees would become vested, *when, in reality, few might vest*, and none in fact could [vest] based solely on employment with CP&P." Brief on the Merits by Petitioner, p. 20 (emphasis added).

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IN THE

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CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

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CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON THE MERITS BY RESPONDENT

STATEMENT OF THE CASE [3]

A. The Incursion of Withdrawal Liability by Concrete Pipe and Products.

The petitioner, Concrete Pipe and Products of California, Inc., ("CP&P") is a California corporation formed as a wholly-owned subsidiary of Concrete Pipe

[3] All references to the Record ("R.") are to the Docket Entries of District Court Case No. 82-5184 (reproduced at J.A. 2-6), except where otherwise stated. References to evidence submitted in the arbitration below is further identified by reference to the pages of the transcript where the testimony appears and, for exhibits, to the pages where the exhibit was identified and admitted into evidence, then to the exhibit number or letter and, thereafter, to the page(s) of the exhibit.

and Products Co., Inc. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 12. CP&P was formed to facilitate the purchase in December, 1976 of certain assets of Cen-Vi-Ro. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 12. The assets purchased included two concrete pipe manufacturing plants with accompanying manufacturing equipment. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 12. One plant (the "Shafter Facility") was located in Southern California on a forty acre leasehold near the town of Shafter, a small town near Bakersfield. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 12, 50, 64; J.A. ¶ 5. The Shafter Facility had the capacity to produce 10,000 to 12,000 tons of concrete pipe per year. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 50-51. The other plant was located in Northern California, near Sacramento. At the time of purchase, the Shafter Facility produced an estimated 7,500 to 10,000 tons of concrete pipe per year. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 13.

After purchasing the assets from Cen-Vi-Ro, CP&P continued without interruption to operate both plants and to sell its concrete pipe. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 12.

Cen-Vi-Ro had operated the plant in Shafter in the years prior to its purchase by CP&P. J.A. 74, ¶ 3. Employees of Cen-Vi-Ro were represented by one of a number of unions depending upon employee job classification. Among these unions was the Southern California District Council of Laborers and its affiliated local union, Local Union No. 220 (the "Laborers"). J.A. 75, ¶ 8. Cen-Vi-Ro's agreement with the Laborers provided that Cen-Vi-Ro contribute at a specified rate to the Construction Laborers Pension Trust for Southern California ("CLPT") for each hour worked by its employees who performed duties as laborers. J.A. 75, ¶¶ 7-8.

In the two years immediately preceding the sale of assets, Cen-Vi-Ro reported hours and paid contributions to CLPT as follows:

Year	Hours	Contributions	Avg. Rate
1975	35,170.50	$28,227.31	$ .80/hr.
1976	17,243.25	18,395.01	$1.06/hr.

R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. B.

CP&P, upon effecting its December, 1976, purchase of the assets of Cen-Vi-Ro, continued to operate the Shafter Facility in the same manner and with essentially the same personnel as had Cen-Vi-Ro. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, Ex. 36, 2. CP&P adopted the labor agreements of Cen-Vi-Ro in effect at the time of purchase and began making contributions to CLPT on behalf of CP&P employees. J.A. 76, ¶ 9.

In 1978, CP&P negotiated a new three-year collective bargaining agreement with the Laborers for the Shafter Facility. J.A. 76, ¶ 9. Among other provisions, this collective bargaining agreement provided for CP&P to obtain laborers as needed from the Local Union's hiring hall and provided for continuation of the contributions by CP&P to CLPT for its laborers at a rate of $1.20 per hour commencing in 1978. R. 214, Arb. Tr. 79, 79, CP&P Ex. 9, 1-3, 13. CP&P permitted the possibility of escalations of this contribution rate in 1979 and in 1980 by agreeing that 40¢ per hour, in each year, could be allocated by the Laborers at their discretion among wages and fringe benefits. R. 124, Arb. Tr. 79, 79, CP&P Ex. 9, Ex. A, 2.

In mid-1978, CP&P's orders for and production of pipe dropped to a rate of approximately 2,500 tons per year. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 13-14. From there, demand continued to decline until production ceased in August 1979. *Id.* at 13-14. The Shafter Facility was "mothballed" pending an increase in business. J.A. 216.

CP&P reported hours and paid contributions to CLPT as follows pursuant to its Shafter Facility collective bargaining obligations:

Year	Hours	Contributions	Avg. Rate
1977	25,745.75	$ 29,337.71	$1.14/hr.
1978	41,594.50	49,913.04	$1.20/hr.
1979	17,355.00	20,826.60	$1.20/hr.
1980	40.50	48.60	
Total	84,735.75	$100,125.95[4]	

R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. B.

In October and November 1981, CP&P bargained to impasse with the Laborers over a new collective bargaining agreement, withdrew recognition of the Laborers as a representative of its laborer employees, and gave notice that its obligations under the 1978 labor agreement would terminate. J.A. 209.

Concurrently, in November, 1981, CP&P reopened its Shafter Facility to fill two orders it had solicited totalling 7,000 tons of pipe. J.A. 209. CP&P hired employees in classifications covered by its prior agreement with the Laborers. J.A. 216. It neither contributed to, nor resumed an obligation to contribute to CLPT for such work.

CP&P's actions constituted a cessation of CP&P's "obligation to contribute" to the CLPT pension plan, producing a "complete withdrawal" by CP&P from CLPT and subjecting CP&P to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") in the amount of $190,465.57. J.A. 402, 416, 431-32.

B. The Allegations of Constitutional Defects.

CP&P asserts MPPAA is unconstitutional as applied to it essentially because:

1. It imposes liability on CP&P for actions taken by the Board of Trustees of CLPT both before and after the enactment of MPPAA to establish and increase benefit

[4] Total CP&P contributions to CLPT for December 1, 1976 through 1980, were $102,656.68. J.A. 76, ¶ 10.

levels, actions in which CP&P essentially had no say, control, or influence. Pet. Brief, § V.B. at p. 20.

2. The liability being assessed by CP&P is to pay benefits to employees other than its own while its own employees are unlikely to vest because of CP&P's brief period of contributions. Pet. Brief, § V.A. at p. 19-20.

3. The collective bargaining agreements providing for contributions into CLPT and the Trust Agreement establishing CLPT expressly limited employer liability for anything other than the hourly contributions called for in the collective bargaining agreements. *Id.* at 19-20.

4. The presumptions in favor of the decisions of CLPT, its actuary and an arbitrator deprive CP&P of access to an unbiased decisionmaker. Pet. Brief, § V.C. at p. 21.

C. The History and Context of MPPAA as Applied to Concrete Pipe and Products.

The statutory framework and history and the context of multiemployer defined benefit plans and their use of actuaries which give rise to CP&P's withdrawal liability are recounted in the "Statement" of the Brief of the Pension Benefit Guaranty Corporation as *Amicus Curiae* in Support of Respondent in this action and will not be duplicated here. *See* Brief of PBGC, pp. 1-10.

D. The Construction Laborers Pension Trust for Southern California: Its Creation, Operations, Benefits, and Liabilities.

In 1976, when CP&P replaced Cen-Vi-Ro in contributing to CLPT for work at the Shafter Facility, CLPT had been in existence for almost 15 years. It was already subject to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. ("ERISA") and had implemented the benefits called for by that act of Congress. R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 30, Ex. I.

CLPT was established on June 15, 1962, through negotiations between the Laborers and various construction

industry multiemployer trade associations in Southern California. J.A. 15, ¶ 6; Pet. Brief § IV.B.(1) at p. 3. It is governed by the requirements of Section 302 of the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley Act"), 29 U.S.C. § 186, as amended.

Section 302(a) of the LMRA prohibits payments by an employer to any representative of his employees unless a specific exception in Section 302(c) applies. Section 302(c)(5) excepts from the prohibitions contributions to a pension trust fund if the fund is established "for the sole and exclusive benefit" of the employees pursuant to a written document which describes the detailed basis on which the payments are to be made. Employers or employees must be represented equally in the administration of the fund, and an arbitration procedure must be provided in the event of deadlock by the trustees. 29 U.S.C. § 186(c)(5).

As contemplated by Section 302, CLPT is governed by a Board of Trustees ("Trustees" or "Board"). Half of the Trustees are appointed by the Laborers and half are appointed by the multiemployer associations. J.A. 75 at ¶ 6.

CLPT is exclusively employer-funded, receiving its revenues from contributions made by each participating employer for each hour worked by the employer's employees. *Ponce v. Construction Laborers Pension Trust for Southern California*, 628 F.2d 537, 539 (9th Cir. 1980).

By resolution in October 1962, the Trustees were empowered to create a pension plan. *Id.* On December 27, 1962, they did so. *Id.* The Trustees implemented this plan and modified it frequently from 1962 through December 31, 1975. They did so in their discretion and without mandate from the collective bargaining parties of either benefit levels or eligibility requirements. *Ponce v. Construction Laborers Pension Trust for Southern California*, 582 F. Supp. 1310, 1312 (C.D. Cal. 1984).[5]

[5] Effective January 1, 1976, the Trustees modified the plan to comport with ERISA which compelled the implementation of ten-

The plan adopted by the Trustees at its inception and through 1975 provided pension eligibility for laborers who reached retirement age, having accumulated at least 700 hours or more of "Future Service Credit" (hours of work after June 15, 1962, for which CLPT was entitled to receive pension contributions) and who had accumulated at least 15 years of "Credited Service." "Credited Service" is 1,200 or more hours of employment in one year for which "Future Service Credit" is awardable (contributions are payable) and for employment in the industry prior to the June 15, 1962, date of establishment of the pension plan for which Past Service Credit is awardable. Initially, Past Service Credit was available for employment as far back as 1937. R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. I.

The pension benefit payable for one who retires is a flat monthly benefit multiplied by the number of years of credited service. This monthly benefit amount has been repeatedly increased by the Trustees. On each occasion, the monthly benefit increase has been given to all plan participants for all years of service. *Id.*

Both in the years before CP&P began to contribute to CLPT and after, the Trustees repeatedly improved pension benefits and liberalized eligibility requirements,[6] and the collective bargaining parties repeatedly increased hourly contribution rates payable to CLPT. The following table reflects the changes in contribution rates negotiated by the collective bargaining parties and the monthly pension benefit amounts established by CLPT:

year vesting and other eligibility requirements. R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, F, 30. In 1980, three successive 10% benefit increases were initiated by the collective bargaining parties conditioned upon the Union allocating sufficient monies within its allocation rights to provide 125% coverage of the cost of providing the increased benefit. R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. K, 3.

[6] *Ponce v. Construction Laborers Pension Trust for Southern California*, 582 F. Supp. 1310, 1312-13 (C.D. Cal. 1984). *See, also*, R. 124, Arb. Tr. 115, 116, Jt. Ex. F, 27-30; Ex. I.

CHANGES IN CONTRIBUTION RATES AND BENEFIT AMOUNTS

Effective Date Year	Month	Day	Hourly Contribution Rate Laborers	Monthly Benefit Amount Per Year of Credited Service Laborers	Maximum Normal Pension Laborers
1962	June	15	$ .10		
1963	January	1		$ 2.67	$ 53.40
1965	June	1	.15		
1966	June	1	.22	11.75	293.75
1967	June	1	.27		
1968	June	1	.32		
1969	June	1	.35		
	December	1		13.75	343.75
1970	October	1	.60	32.40	No Maximum
1971	August	1	.85		
1972	May	1	1.10		
1973	August	1	1.35		
1974	December	1	1.50		
1975	October	1	1.65		
1976	October	1	1.95		
1977	July	1	2.30		
	December	31	2.45		
1979	July	1	2.55		
1980	July	1	2.90	35.64	
1981	July	1	3.28	39.20	
1982	July	1	3.74	43.12	

R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 26.

When the Laborers and the multiemployer associations established CLPT in 1962, and delegated to the Trustees the responsibility for defining, establishing, and managing a pension plan, the collective bargaining parties expressly agreed that the participating employers would not be liable for any sums other than the hourly contribution

required by the collective bargaining agreements. The Trust Agreement establishing CLPT provided:

> Section 4.07. Neither the Association or [sic] any officer, agent, employee or [sic] committee member of the Associations shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to her or its own individual or joint venture operations, or to the extent that he may incur liability as a Trustee as hereinafter provided. The liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operation of the Fund or of the Pension Plan, except as may be hereafter provided in the Collective Bargaining Agreement.
>
> Section 4.08. Neither the Associations, any Individual Employer, the Union, any Local Union, nor any Employee shall be liable or responsible for any debts, liabilities or obligations of the Fund or the Trustees.

J.A. 80-81, at ¶ 32.

This understanding of the collective bargaining parties was consistent with the ordinary understanding of employers providing pension plans throughout the nation. *See Nachman Corp. v. PBGC*, 446 U.S. 359, 378, 100 S.Ct. 1723, 1735, n.28 (1980).

Following the passage of ERISA, the collective bargaining parties agreed in the 1977-1980 Laborer's Craft Master Labor Agreement, Article X, § E(4):

> The parties recognize and agree that the Pension Trust and Plan was created, negotiated, and is intended to continue to be *if permitted by law under ERISA*, a defined contribution plan and trust and that the individual Contractor's liability with regard to the pension has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements.

J.A. 82 at ¶ 34 (emphasis added).

The collective bargaining parties further provided in Appendix K to the Southern California Master Labor Agreements in 1977-1980 a notice to employees of the position of the collective bargaining parties that pension benefits were not intended to be guaranteed by the employers beyond payment of the hourly contributions. J.A. 81-82 at ¶ 33.[7]

In July, 1980, the multiemployer associations and the Laborers agreed to a new Master Labor Agreement. The agreement provided that CLPT would increase the monthly pension benefit payable for all credited service by 10% in each of three (3) succeeding years, provided that the Laborers allocated sufficient monies from the increases promised to them in the second and third years of the term of the Master Labor Agreement to fund the benefit improvement by 125% of the cost estimated by CLPT's actuary. J.A. 358; R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 26, Ex. K, 3.

In 1981, when CP&P withdrew from the CLPT, CLPT was paying pensions to 7,524 pensioners and 382 beneficiaries of deceased participants. Further, CLPT had

[7] Petitioner contends that this Appendix K was incorporated by reference into the CP&P collective bargaining agreement. Respondent does not agree that this contention accurately reflects the state of the record. Respondent further notes that CP&P does not contend that it or its personnel were aware of this or any other exculpatory provision or that they relied in any way on the existence of such a provision.

5,027 active participants with vested pension rights and 11,405 active participants with credits but who had not yet vested. R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 6.

The employers who retained an obligation to contribute to CLPT in 1981 paid CLPT more than $81 million in recognition of hours worked by their employees. CLPT earned investment income exceeding $14 million. It paid retirees and beneficiaries $59 million in pension benefits. *Id.* at 21.

The "scheduled actuarial cost" for 1982 reflects the actuary's anticipated allocation of the contributions being received by CLPT from employers remaining in the plan in the year following the 1981 departure of CP&P. This schedule projected an average employer contribution of $3.51 per hour. Of this, $3.06 per hour was slated to be used to amortize past unfunded vested liabilities of the Plan (the same liabilities which a departing employer such as CP&P is assisting to amortize through payment of its withdrawal liability). Only 57.7¢ was expected to be needed to provide the pension benefit actually earned by the employee who worked the hour that generated the $3.51 contribution. Finally, 7.1¢ per hour was estimated as needed for administrative overhead. *Id.* at 24.

E. Relationship Between CP&P and CLPT.

CP&P has offered no evidence that it made any investigation or inquiry into CLPT, its financial condition, its plan of benefits, or its operation at any time prior to its commencing contributions to CLPT. CP&P simply began contributing to CLPT for work performed at the Shafter Facility from December 1, 1976, until its obligation to contribute ceased. J.A. 76 at ¶ 10. Other than sending in reports with contributions, CP&P makes no claim of any communication with CLPT until it received its withdrawal liability billing from CLPT.

At the time CP&P was created and began contributing, executives of it and its parent company had knowledge

of ERISA. In 1976, the parent company of CP&P, Concrete Pipe & Products Co., Inc., had maintained for some years a corporate pension plan for employees other than those covered by collective bargaining agreements. This corporate plan was in effect prior to ERISA. Mr. Stanley A. Navas, President and CEO of both Concrete Pipe & Products Co., Inc., and CP&P was actively involved in the amendment of the corporate plan to comply with ERISA and was familiar with ERISA from 1974 and thereafter. R. 124, Arb. Tr. 64, 67; CLPT Ex. 2, 100.

CP&P has also offered no evidence that it commenced an obligation to contribute to CLPT under duress or mistake or in reliance upon any misrepresentation by anyone. CP&P has not contended that it attempted to negotiate with the Laborers to divert pension contributions from CLPT to its own corporate plan or to another pension plan or to cease such pension contributions altogether on its laborers.

Mr. Navas does contend that he was unaware of the MPPAA and its potential impact upon CP&P until the day he received the withdrawal liability billing from CLPT. R. 124, Arb. Tr. 64, 67; CLPT Ex. 2, 104.

F. The Presumptions Used In Adjudication Of The Withdrawal Liability of Concrete Pipe And Products.

By letter dated January 20, 1982, CLPT asserted a claim for withdrawal liability against CP&P in the amount of $268,168.81. CLPT advised that this sum could be paid in 132 monthly installments in the amount of $2,821.80 together with a final monthly payment of $2,226.74. J.A. 36-37. (The payment plan thus contemplated paying CLPT a total of $33,861.60 in the first year.)

When CP&P refused to pay, the parties commenced litigation. At all times, CLPT contended that the withdrawal liability of CP&P arose by operation of law, not

by act of CLPT. J.A. 12 ¶ 9. CLPT pursued collection simply because the law imposed upon it an obligation

> [t]o determine the amount of defendant's withdrawal liability, to notify defendant of the amount . . ., and to effect collection. . . .

J.A. 12 ¶ 10.

CLPT has never contended in the litigation that it has acted as a "tribunal" to "adjudicate" defendant's withdrawal liability. At no time has CLPT asserted in the litigation that it is a "decisionmaker" entitled to deference in its findings. Rather, at all times, CLPT has contended:

> The presumption in favor of the Trust that requires a withdrawing Employer to carry the burden of proof that Trust's determinations are unreasonable [29 U.S.C. 1401(a)(3)(A)] is simply a constitutional allocation of burden of proof to Employer in withdrawal liability cases; hence, in order to defeat Trust's calculations, Concrete Pipe has [the] burden of showing that the determination was "unreasonable or clearly erroneous."

J.A. 384-85.

The arbitrator agreed:

> Concrete Pipe has the burden of rebutting the presumption of Section 1401 [sic] of ERISA [29 U.S.C. 1401] and establishing by a preponderance of the evidence that the determination of Plan sponsor was unreasonable. This they did not do.
>
> * * * *
>
> It is concluded, therefore, that Concrete Pipe has failed to carry the burden of overcoming the statutory presumption by a preponderance of the evidence.

J.A. 400-01.

Accordingly, the arbitrator issued his award:

> 1. Concrete Pipe and Products Company of Cali- has failed to show by a preponderance of the evidence that, in the aggregate, the actuarial assumptions and methods used by the Trust in the determination of Concrete Pipe and Products Company of California were unreasonable.

J.A. 401-02.

The District Court reviewed the decision of the arbitrator. It found with respect to its presumption under the MPPAA, 29 U.S.C. § 1404(c), that the factual finding of the arbitrator is to be upheld unless against the "clear preponderance" of the evidence:

> Presumably this means more than a mere preponderance and something less than a "clearly erroneous" standard.

J.A. 419.

The Court of Appeals affirmed. J.A. 431-32.

In upholding the arbitrator, the District Court commented on the evidence in the arbitration:

> The plan's actuary had the significant fortifying feature of being the most widely recognized in the field, with massive experience nationwide in advising pension trustees. CP&P attacked the assumptions with an actuary of vastly less experience (in fact no experience with multiemployer trusts). While the use of any economic prediction factor can be debatable, the Court cannot say, or come close to saying, that the conclusions of the arbitrator are against the clear preponderance of evidence. The Court accepts the reasoning of the arbitrator in this respect and adopts his findings.

J.A. 423.

SUMMARY OF ARGUMENT

Concrete Pipe and Products suffers neither a substantive denial of due process nor an unconstitutional taking of property as a consequence of the assessment of withdrawal liability against it under the Multiemployer Pension Plan Amendments Act of 1980. This Court's prior decisions upholding the facial validity of this statute are controlling. *PBGC v. R.A. Gray Company*, 467 U.S. 717, 104 S.Ct. 2709 (1984); *Connolly v. PBGC*, 475 U.S. 211, 106 S.Ct. 1018 (1986). Concrete Pipe and Products offers no evidence that, as applied to it, the MPPAA is irrational or arbitrary or that it has suffered an impermissible taking by reason of interference with its property expectations and rights. Concrete Pipe and Products cannot escape the facts that it commenced participation in the Construction Laborers Pension Trust for Southern California after ERISA had become effective and after virtually all of the liabilities which it objects to sharing were established and known to any employer who inquired. Further, Concrete Pipe and Products has not shown that it and its employees did not benefit from their participation in the Plan.

Similarly, Concrete Pipe and Products has not shown that the presumptions of the MPPAA deny it or any other employers due process. The presumptions favoring the correctness of determinations made by a plan are mere allocations of the burden of proof. The Plan does not act as a tribunal to adjudicate any matter.

The presumptions in favor of the actuary are likewise appropriate. Most of the assumptions used by an actuary are used with respect to the plan's overall funding management. They are relied upon for all purposes. An isolated number of assumptions apply to withdrawing employers. Bias by an actuary in this area or the exercise of undue influence upon the actuary by plan trustees can be ferreted out in the arbitration process using the existing presumptions established by Congress.

ARGUMENT

I. THE APPLICATION OF THE MPPAA TO CONCRETE PIPE AND PRODUCTS CONSTITUTES NEITHER A DENIAL OF SUBSTANTIVE DUE PROCESS NOR AN UNCONSTITUTIONAL TAKING OF PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT.

A. This Court's Rulings in *Gray* and *Connolly* are Dispositive of the Claim of Concrete Pipe and Products; It Offers No Evidence to Remove it From the Penumbra of Those Precedents.

This Court has previously addressed and rejected "facial" challenges to the constitutionality of the MPPAA on the grounds of denial of substantive due process and unconstitutional takings in violation of the Fifth Amendment. *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709 (1984); *Connolly v. PBGC*, 475 U.S. 211, 106 S.Ct. 1018 (1986). Petitioner attempts to escape from the import of these rulings by contending that, as applied to it, due process is denied and the taking occurs. To do so, it takes liberties with the record below in order to evoke the continuing concerns expressed by members of the Court in resolving *Gray* and *Connolly*.

The PBGC, in its Brief *Amicus Curiae* in Support of Respondent, expertly dissects the contentions of law advanced by CP&P in attempting to escape the dispositive effects of *Gray* and *Connolly*. CLPT will focus on the contentions of fact of CP&P.

CP&P acknowledges it has a heavy burden to bear in establishing factually that the MPPAA violates due process as applied to it and or constitutes an improper taking from CP&P without just compensation. It expresses a willingness to shoulder that burden and journey to such a result. Pet. Br. at p. 21.

The facts which CP&P chooses as fuel for its expedition, however, lack octane. They are either non-probative or

indistinguishable from those implicitly present in the facial challenges to the MPPAA previously rejected by this Court in *Gray* and *Connolly*. They cannot propel CP&P beyond the precedential shadows cast by *Gray* and *Connolly*.

B. CP&P Offers No Facts Establishing that the MPPAA Deprives it of Due Process.

CP&P asserts four points to suggest that it has been substantively denied due process under the Fifth Amendment. To succeed, CP&P must establish that Congress has acted arbitrarily and irrationally. *Gray, supra* at 729. None of these points is of assistance to CP&P.

1. *CP&P Errs in Contending That it Has Promised No Benefits Which Deserve the Protection of the MPPAA.*

First, CP&P asserts that its contribution obligation was expressly limited to the hourly contribution called for in the collective bargaining agreement. It notes that the Trust Agreement of CLPT confirms that an employer's liability is limited to its contributions.

This contention was directly rejected by this Court in *Connolly* with respect to a Taking Clause claim . To paraphrase the Court there:

> "It would be surprising indeed to discover now that, [in both cases Congress unconstitutionally had deprived the employers of due process]."

Connolly, 475 U.S. at 220, 223, 1018 S.Ct. at 1023-24, 1025. Further, CP&P asserts this position from a much weaker footing than the parties in *Connolly*. CP&P did not begin an obligation to contribute to CLPT until after the passage of ERISA had called into question the viability of exculpatory clauses. CP&P was familiar with ERISA at the time that the obligation to contribute was assumed.[8]

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[8] On the other hand, the appellants in *Connolly* included the Trustees of the Operating Engineers Pension Trust. Those Trustees had

2. *CP&P Errs in Contending That its Contribution History has Imposed No "Vested Service" Liability Upon CLPT.*

CP&P asserts that it had no "proportional share" of the liabilities of CLPT because none of its employees could have worked sufficient years to vest in a pension for service attributable solely to employment at CP&P. This contention ignores the fact that multiemployer plans must provide portability of credits for all employers within the plan. 29 U.S.C. § 1053. CP&P has offered no evidence that its employees lack sufficient credit to be vested in CLPT.

On the contrary, all indications are that the employees on whom CP&P contributed were likely to be laborers who already had credited service with CLPT. CP&P adopted an existing labor agreement of Cen-Vi-Ro which called for contributions into CLP. CP&P signed a new labor agreement which continued the contribution obligation to CLPT and which affirmed that CP&P would obtain its employees from the local Laborers hiring hall. It is quite conceivable that each and every employee on whom CP&P contributed could have vested rights in CLPT with a corresponding liability impact on CLPT.

3. *CP&P Errs In Asserting That The MPPAA Withdrawal Liability Calculation Formula As Applied To It Is Arbitrary and Irrational.*

CP&P asserts that the formula for computing withdrawal liability is irrational and that it fails to account for exclusion rates and extended vesting schedules for

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created and managed a pension plan established in 1960 through labor negotiations which included the same multiemployer associations that established CLPT. The Trustees in *Connolly* asserted the continuing viability of the exculpatory clauses in the face of ERISA and of MPPAA. As parties who had managed their plan in light of its exculpatory provisions, they certainly encountered a greater alteration of expectations with a potentially greater irrational effect than did CP&P.

short-term employers such as CP&P. It further argues that the formula punishes those employers who pay higher pension contributions than other employers.

CP&P offers no evidence to show that either of the foregoing features impacts CP&P adversely.

More fundamentally, each of the foregoing contentions reflects a misperception of the formula. In a multiemployer plan, particularly a construction industry multiemployer plan where short-term employers and short-term employment are common, the employees who acquire rights in the pension plan and thus impose funding burdens upon it are the long-term employees who, by and large, work for many short-term periods of employment. If CP&P happened to be the last employer providing a particular long-term industry employee with the employment needed for that employee to vest, CP&P's short-term employment was, in a sense, very expensive to the pension plan as a whole, because it facilitated that employee finally acquiring his vested right.

Multiemployer plans exist, in large part, because of this short-term employer phenomenon and the need of such employers for qualified employees and the consequent need of the long-term industry employees for a common source for retirement savings.

CP&P's contention regarding the irrationality of apportioning withdrawal liability based on comparisons of total contributions is not properly before the Court. The Fifth Amendment issues are on an "as applied" basis. As a manufacturing plant employer, CP&P paid a lower contribution rate than the majority of construction industry employers in CLPT. Were CP&P's contention correct, it would have been benefited by the formula rather than deprived.

Nevertheless, the challenge is ill-considered. Were CP&P's contribution rate to be double that which it did

pay, its employees would have earned greater benefit credits as a result of the higher contribution. Thus, the liability to the CLPT would be greater. Moreover, once the contribution level of the master labor agreement is equalled, contribution rates simply go no higher.

1. *CP&P Errs In Asserting That It Is Irrational To Apportion To It Unfunded Vested Liability Arising Prior To Its Commencement Of Participation In The Plan And Increased Unfunded Vested Liability Incurred At The End Of Its Participation.*

CP&P's final challenge to the rationality of the MPPAA is its contention that it should not be saddled either with the funding promises made by CLPT before it commenced participation or with the funding consequences of the benefit improvement made in 1980 (at the instance of the collective bargaining parties). Neither contention is supported by facts reflecting any irrational impact.

CP&P simply started contributing to CLPT in 1976. It offers no facts to establish that it inquired into the financial condition of CLPT, its obligations or its plan of benefits. Presumably, CP&P needed employees, knew the Laborers and Cen-Vi-Ro had them, and put them on the payroll, commencing participation in CLPT without much thought. At the time it commenced participation, the president of CP&P was aware of the impact of ERISA on pension plans. No evidence is offered that CP&P attempted to avoid assuming an obligation to contribute. By participating in CLPT rather than establishing its own plan or refusing to provide pension benefits, CP&P may have incurred liability but, overwhelmingly, the liability it incurred is of its own making. If there was an irrational act that produced the liability of CP&P, it was not an act of Congress.

C. CP&P Offers No Facts Establishing That The MPPAA Violates The Taking Clause Of The Fifth Amendment.

CP&P asserts that its "property" has been taken as a consequence of the assessment against it of withdrawal liability in the amount of $190,465.57. CP&P purports to provide facts entitling it to a determination that the liability constitutes an uncompensated taking in violation of the Fifth Amendment both under the "*ad hoc*" factors noted by this Court in *Connolly* and the categorical approach discussed most recently in *Lucas v. South Carolina Coastal Council*, —— U.S. ——, 112 S.Ct. 2886, 1992 W.L. 142517 (June 29, 1992).

As will be demonstrated, the circumstances identified do not establish an unconstitutional taking by Congress of CP&P's property.

1. *CP&P Fails To Establish That The MPPAA Has An Unconstitutional Economic Impact Upon It.*

Referencing the concurring opinion in *Connolly*, CP&P asserts that the withdrawal liability assessment represents a devastating economic impact which merely provides funds to CLPT to pay for benefit increases and vesting schedule changes occuring both prior to CP&P's creation in 1971 and at the end of its participation in 1980 and 1981.

The fallacy underlying these contentions has been discussed previously. The contributions paid to CLPT by CP&P may well have enabled employees of CP&P to receive pensions in their retirement years. CP&P has not shown otherwise. Further, when CP&P chose to participate in CLPT, it had the ability to know what the plan was that CLPT provided and how it was functioning. If CP&P chose not to educate itself concerning a business matter of some potential importance, Congress and the taxpayers should not be prohibited from leaving CP&P to shoulder the burden of its alleged mistake.

CP&P can only complain of the enactment of the MPPAA, ERISA already being in place when CP&P commenced contributing to CLPT. MPPAA represented a "prophylactic extension" of ERISA. *Connolly*, 475 U.S. at 231, 106 S.Ct. at 1029. CP&P has not proven that MPPAA deprives it of property unconstitutionally. Indeed, the record reflects that CP&P re-opened the Shafter Facility for the purpose of producing 7,000 tons of concrete pipe, almost a year's worth of production. By virtue of having withdrawn from CLPT, it had no obligation to pay CLPT $1.20 for each hour worked by its laborers as they performed that work. Conceivably, the absence of the contribution obligation facilitated CP&P's acquiring the work. Whatever the case may be, CP&P relieved itself of an obligation to pay money into CLPT. In doing so, it reduced the hours of contributions that would otherwise have been received by CLPT, and retained those dollars to be used for its own purposes. This prospect of a "diminishing contribution base" in multiemployer plans is precisely one of the reasons underpinning Congress' determination to modify ERISA and provide for withdrawal liability. *Gray*, 467 U.S. at 722, n.2, 104 S.Ct. at 2714.

2. ***CP&P Offers No Evidence to Support A Finding That Application Of The MPPAA To CP&P Impairs Its Reasonable Investment-Backed Expectations.***

CP&P offers no evidence that it had any expectations, investment-backed or otherwise, when it began contributing to CLPT in December 1976. The labor agreement it adopted did call for payment of a specified amount per hour, but CP&P's President was aware of ERISA. CP&P did not inquire into the condition of CLPT, its financial condition or plan of benefit. It did not negotiate to avoid assuming an obligation to contribute to CLPT. It did not chose to limit its potential pension liability by either refusing to participate in any pension plan or by choosing to offer a plan over which it maintained control. CP&P

offers no evidence that it was even aware of the exculpatory provisions of the Trust Agreement or the Master Labor Agreement. It certainly offers no evidence that it relied on any representations or misrepresentations of any entity or individual.

CP&P has simply not established either that it had any distinct investment-backed expectation when it began sending checks to CLPT or that those expectations were impaired by the MPPAA.

3. ***CP&P Offers No Proof That The Nature Of The Governmental Action Is In Any Way An Improper Interference With Its Property Rights.***

CP&P complains that the withdrawal liability imposed upon it is governmental action assessing pension liability for employees of entities other than CP&P. However, it offers no contentions not before the Court in *Connolly*.

CP&P has less reason to complain than the litigants in *Connolly* since it did not commence contributions to CLPT until after the passage of ERISA. CP&P had the ability to know the promises CLPT had made to employees of other employers—the unfunded obligations of CLPT. CP&P was on notice that Congress expected for participating employers in multiemployer plans to fund the benefit promises that had been made in the years prior to ERISA as well as any future promises that would be made.

4. ***CP&P Does Not Establish That The Withdrawal Liability Assessed Under The MPPAA Constitutes A Categorical Taking In Violation Of Lucas.***

CP&P asserts that a taking occurred within the categories established in *Lucas v. South Carolina Coastal Council*, *supra*. The basis for this contention is that CP&P is to be deprived of 46% of its book net value without any

compensation. CP&P offers no proof of this event, however.

It is true that a substantial monetary liability has been incurred by CP&P. However, CP&P was compensated for that liability. It may not, in hindsight, feel that the bargain was worth it, but it was compensated.

After ERISA placed the business community on notice that the promises made in pension plans would be funded by the employers, CP&P chose to participate in CLPT. In return, it received the labors of its laborer employees. It received the administrative services of a pension plan without having to worry about establishing and administering its own. It may even have received the satisfaction of providing its employees with benefits believed by them to be of value. And it received all of this without having to expend any effort to investigate the product it was purchasing and the potential future benefits and burdens of that product. In short, it purchased ease of doing business and saved effort. What it complains about today is the price.

CLPT does not contend that the price is nominal. It does contend that the bill is not unconstitutional.

II. THE STATUTORY PRESUMPTIONS OF MPPAA DO NOT VIOLATE THE DUE PROCESS CLAUSE; THEY ARE BURDENS OF PROOF APPROPRIATELY ALLOCATED AND ADJUDICATED BY IMPARTIAL DECISION MAKERS.

Once again, CLPT defers to the Brief *Amicus Curiae* of PBGC in Support of Respondent for its deft presentation on the law and the legislative, administrative and arbitral context surrounding the presumptions of the MPPAA. Respondent offers the view of this multiemployer plan on the appropriate interpretation of the presumptions of MPPAA.

For over a decade, CLPT has been implementing the withdrawal liability mandates of the MPPAA. It did not

ask for this task. It has proceeded to carry out the duties of the MPPAA because they are there. Its papers throughout this case reflect CLPT's view of its role.

Thus, it is with some sense of wonderment that CLPT stands before this Court labeled "a biased adjudicator." CLPT is not and never has been an adjudicator in MPPAA matters.[9]

A. CLPT Does Not Function As A "Tribunal" And Does Not "Adjudicate" Any Issue In Withdrawal Liability Matters.

In January 1982, CLPT advised CP&P that it believed CP&P owed withdrawal liability. When CP&P refused to pay and litigation commenced, CLPT, at all times, proceeded on the assumption that withdrawal liability arose by operation of law, not by determination, adjudication, or other act of CLPT. J.A. 12 ¶ 9. CLPT pursued CP&P for collection simply because the law imposed upon it an obligation:

> [T]o determine the amount of defendant's withdrawal liability, to notify defendant of the amount . . ., and to effect collection. . . .

J.A. 12 ¶ 10.

CLPT has contended throughout this case (and in all other MPPAA cases in which it has been involved) that the presumption in favor of the correctness of CLPT's determinations of any matter within the contemplation of Section 4221(a)(3)(A) of ERISA, 29 U.S.C. § 1401(a)(3)(A), is simply an allocation of a burden of proof to the employer. For the employer to prevail, it merely must show that CLPT's determination was "unreasonable or clearly erroneous." J.A. 384-85.

It is the view of CLPT, as evidenced by its papers in this case, that whether or not an employer has withdrawn

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[9] CLPT disputes the allegation of bias as well, but the issue is irrelevant.

is an objective event wholly unrelated to CLPT and its role. Section 4203 of ERISA establishes that an employer withdraws from a plan if, in fact, certain objective events occur. 29 U.S.C. § 1383. This result occurs whether CLPT knows of it or not.

CLPT's role commences only "when an employer withdraws." 29 U.S.C. § 1382. Once that event happens, then and only then does the plan sponsor, CLPT in this case, determine the amount of the liability, notify the employer of the amount, and collect the amount. 29 U.S.C. § 1382.

Contrary to the allegations of Petitioner and its *Amici* regarding purported mischief elsewhere, CLPT views the determination of the amount of withdrawal liability to be an arithmetic calculation based upon the ongoing actuarial procedures for the Plan, supplemented by several actuarial assumptions unique to withdrawal liability which are identified and developed by the same actuary that CLPT uses for all purposes.

The plan review mechanism for CLPT serves precisely as PBGC describes it. It provides an informal pre-arbitration procedure by which an employer who has been assessed for withdrawal liability and CLPT representatives may communicate, debate, inform and educate one another as to the facts, circumstances and merits, or demerits of a specific claim.

No adjudication of any kind occurs until CLPT and an employer proceed either before a district court or agree to an arbitrator. Before an arbitrator, the threshold question is one of objective fact, did the employer withdraw or did he not. If it is a close call, the burden under the preesumption of Section 4221(a)(3)(A) must be borne by the employer to establish by a preponderance of the evidence that the plan's determination was unreasonable or clearly erroneous.

B. Imposing The Burden of Proof Upon The Withdrawing Employer to Establish By a Preponderance of the Evidence That A Plan's Determination Is Unreasonable or Clearly Erroneous is Constitutional and Appropriate.

Allocating the burden of the Section 4221(a)(3)(A) presumption of correctness in favor of the plan and against the employer is logical and appropriate in the overall context of the MPPAA. In enacting MPPAA, Congress, in essence, said to an employer leaving a multiemployer plan: "If you go, you owe—unless you are entitled to an exemption or other mitigation factor." In the typical case that arises the employer is, in fact, gone in the sense that he has ceased having an obligation to contribute. Thus, in terms of the purpose of MPPAA, the employer "owes" unless he can establish a right to an exception.

In theory, withdrawing employers who are not entitled to an exception know that they have withdrawn and that they owe. They should, therefore, be expected to telephone the plan administrator and ask for a bill to be computed and sent such that they may commence payments.

Some employers do view their obligation this way. Many more, like many taxpayers, would prefer to keep the money unless and until faced by a collector. CLPT is the designated tax collector. Congress created the tax for a departing employer. The departed employer owes it, except to the extent he can surmount the burden and prove he is allowed an exemption or reduction. The actuary calculated it. CLPT attempts to collect it. If a dispute arises, an arbitrator or a court adjudicates it. Such an allocation of a burden of proof is constitutional. *Schweiker v. McClure*, 456 U.S. 188, 196, 102 S.Ct. 1665, 1670-71 (1982).

C. The Presumptions In Favor Of The Actuary Are Appropriate In That The Employer Has Consented To The Actuary Being Used And Opportunity Exists For Unbiased Arbitral Review Of The Actuary's Performance.

The precise liability assessed against an individual employer upon withdrawal is largely the product of the numbers, estimates and assumptions used by the plan's actuary. Having an adequate basis for challenging such an actuary is important for an employer where the liability can vary widely depending upon the assumptions chosen.

However, the "right" of an employer in withdrawing to challenge the plan actuary's assumptions point by point is overstated. Many of the assumptions of the actuary as to which such discretion exists are assumptions that are used in the day-to-day management of the plan.

For example, in this case, the employer questioned the Plan's actuary concerning its estimate of plan liability for earned but unrecorded years of vested credit of plan participants. J.A. 236-243. This phenomenon exists because of incomplete early plan records. The estimate which the actuary deploys was developed in 1976, approximately on the date on which CP&P began to contribute and long before enactment of the MPPAA or CP&P's withdrawal. CP&P's actuary expressed concern over the reasonableness of the Plan actuary's assumption in this regard. J.A. 270.

This exchange never became material to the outcome of this case but it is instructive as to the reason for bestowing upon the Plan's actuary an overall presumption of correctness unless the assumptions are found to be unreasonable in the aggregate.

CP&P lived with this particular actuarial assumption for its entire participation period in the Plan. All other employers likewise lived with it. To the extent that the assumption impacts estimates of liability, the Trustees

made decisions in managing the Plan over the years which were influenced by this assumption. The collective bargaining parties might well have made decisions in negotiating contribution rates based upon the effects of this actuarial assumption.

Plan funding is based upon the educated guesses of the actuarial profession. It is appropriate for deference to be paid to the actuary responsible for the particular plan by an employer who participated in the plan.

An employer has an adequate ability to impeach an actuary by showing either that the assumptions are, in the aggregate, unreasonable or by showing that evidence exists that the actuary was improperly influenced. As the Briefs *Amici Curiae* of the PBGC and of the National Coordinating Committee for Mulutiemployer Plans (the "NCCMP") reflect, arbitrators have not had difficulty in rejecting the position of a Plan's actuary in the foregoing circumstances. Unreasonableness vis-a-vis withdrawing employers will tend to show up in the actuarial assumptions that most directly impact that precise computation. And the exercise of undue influence tends to leave footprints. Brief of NCCMP, p. 20 and n.12.

CONCLUSION

For the foregoing reasons, Respondent Construction Laborers Pension Trust for Southern California respectfully urges this Court to affirm the decision of the court of appeals in this case.

Respectfully submitted,

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SUPREME COURT, U.S.
FILED
OCT 9 1992
OFFICE OF THE CLERK

No. 91-904

In The

Supreme Court of the United States

October Term, 1992

CONCRETE PIPE AND PRODUCTS
OF CALIFORNIA, INC.,

Petitioner,

vs.

CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF ON THE MERITS

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I.

INTRODUCTION[1]

CP&P challenged MPPAA because the statute violates the Fifth Amendment in three ways: (1) it constitutes an impermissible taking without just compensation as applied; (2) MPPAA violates petitioner's substantive due process rights as applied; and (3) the 29 U.S.C. § 1401 presumptions violate procedural due process by denying CP&P access to an impartial decision maker.

Respondent CLPT, the PBGC, and a number of other *amici* challenge CP&P's arguments on overlapping grounds. As to substantive due process and takings issues, CLPT asserts: (1) the Court has already decided these issues in *Connolly* and *Gray*; (2) CP&P knew about and agreed to assume CLPT's unfunded liabilities; and (3) the unfunded liability is at least partially due to the participation of CP&P's employees so that it can be charged a "fair share" of the liability. As to procedural due process, CLPT and its *amici* claim: (1) CLPT's trustees are not decisionmakers; (2) CLPT's trustees are not biased; and (3) the provisions of 29 U.S.C. § 1401 are not presumptions, but rather burdens of proof.

The facts, however, pierce the rhetoric and sharpen the focus on the issues. First, CP&P paid $1.20 per hour in contributions yet CLPT admits it costs no more than 64.8¢ per hour to administer and cover the benefits earned by the employee.[2] Second, CP&P's employees received no

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[1] Petitioner uses the same abbreviations for the parties, the 1974 and 1980 Acts, and this Court's prior withdrawal liability cases as it used in its Brief on the Merits.

[2] CLPT Br. at p. 11; *see also* R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 24. Before the 1980 benefit increase the cost estimate was 58.1¢ per hour. *Id.* at Ex. E, 23.

past service credits for CP&P employment nor were there benefit increases during CP&P's contribution to CLPT. Third, CP&P's August, 1979 decision to close the Shafter facility irrevocably lead to the withdrawal and this decision was made and implemented before mandatory PBGC coverage of multiemployer plans under ERISA became effective and more than a year before MPPAA was enacted.

II.

SUBSTANTIVE DUE PROCESS

The briefs of CLPT and its *amici* could lead the Court to wonder why it granted certiorari. If it is so clear that *Connally*[3] and *Gray*[4] control the outcome, why did a minimum of four justices agree to hear this case? Indeed, since CP&P's position is so lacking in "octane," one wonders why the court has cluttered its docket with such an unworthy case?

The answer is that this is an "as applied" case, and the facts which distinguish this case from *Connolly* and *Gray* include the fact that none of the unfunded liability is attributable to CP&P's employees. CP&P did not knowingly or mistakenly agree to assume the unfunded liability resulting from the participation in CLPT of other employers and their employees.

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[3] *Connolly v. PBGC*, 475 U.S. 211 (1986) (hereafter "*Connolly*").

[4] *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984) (hereafter "Gray").

A. CP&P Cannot Be Charged With Knowledge That Withdrawal Liability Was A Risk.

In December, 1976, when CP&P was created and began contributing to CLPT, it had no notice that it might be subject to a statute that would require it to pay for the pensions of other employers' employees. The plan documents themselves unequivocally stated that no such liability could or would exist. J.A. 80-81 at ¶ 32. The CLPT trustees themselves did not understand that the plan created a potential for unfunded liability. A contrary understanding would mean that the plan document was fraudulent because it declared that the plan was created, negotiated and was intended to continue to be a defined contribution plan and trust. J.A. 82 at ¶ 34. CLPT concedes that it understood, at that time, that it was a defined contribution plan (which limited its liabilities to the hourly contribution made). This was consistent with the understanding of the collective bargaining parties. CLPT Br. at p. 9.

Defined contribution or individual account plans are clearly permitted under ERISA. 29 U.S.C. § 1002(34). Nothing in ERISA or section 302 of the Taft-Hartley Act[5] prohibits a multiemployer plan from being an individual account or defined contribution plan. Thus, CLPT's and PBGC's "if permitted by ERISA" argument proves too much because it leads the Court to conclude that if CLPT is a defined benefit plan, the CLPT's trustees breached their fiduciary duty under 29 U.S.C. § 1104(a)(1)(D) by failing to operate the plan in conformity with the clearly expressed intention of the plan documents.[6]

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[5] 29 U.S.C. § 186.

[6] *See* J.A. 80-82. The failure or refusal of CLPT's trustees to comply with the trust agreement and Article X, § E(4) of the

CLPT and PBGC assert that CP&P's president was aware of ERISA in 1976 and was thus on notice that withdrawal liability would be assessed. This assumes, of course, that CP&P's president was more competent at interpreting ERISA as applied to Taft-Hartley pension plans than CLPT's trustees or federal judges. At the time CP&P entered the plan in 1976, the same District Court from which this case originated had expressly held that plans like CLPT were individual account plans. *Connolly v. PBGC* 419 F. Supp. 737 (C.D. Cal. 1976), *rev'd*, 581 F.2d 729 (9th Cir. 1978). In 1980, this Court recognized in *Nachman*[7] that the understanding of employers in plans of this nature was that liability was limited. Indeed, as the concurring opinion in *Connolly* notes, the status of Taft-Hartley plans like CLPT was unsettled in 1984. The defined benefit or defined contribution status of CLPT has not been resolved conclusively in this case.

B. CP&P Did Not Agree To Pay For Or Insure Benefits Of Any CLPT Participant.

CP&P did not "agree" to enter a joint venture or be liable for the failure of the trustees to limit the CLPT benefit structure to the available assets. CP&P was not required to provide past service credits dating back to 1937 and benefit increases enjoyed by the employees of other employers. A joint venture is necessarily a creature of contract. CP&P did not agree to pay for decades of service for other people's employees. Thus, the "joint venture" analogy fails miserably.

1977-1980 Laborers' Craft Master Labor Agreement should not permit CLPT to seize CP&P's assets to pay for the CLPT fiduciaries' breach of their statutory duty. *Accord* 29 U.S.C. § 1110.

[7] *Nachman Corp. v. PBGC*, 446 U.S. 359, 378 n.28 (1980).

The "life insurance" analogy does not work either. In effect, CLPT, PBGC and others argue that it is appropriate to exact additional premiums from the insurance policy owner if an insurance company becomes insolvent and incapable of paying the benefits it agreed to pay to other beneficiaries. CP&P knows of no instance where an insurance company has successfully attempted to exact additional premiums from the policyholder in this circumstance. If it were allowed to occur, the purchase of life insurance would not create financial security as expected, but would instead create financial insecurity by converting an intended asset into an unintended and open-ended liability. Insurance policy owners would be as surprised as CP&P to discover that they purchased the risk of funding all the benefits of beneficiaries of all other policies issued.

The truth is that CP&P did not even have knowledge of the possibility of unfunded liability at the time it closed its plant, laid off all employees covered by the plan, and started the irrevocable chain of events that forced its withdrawal from the plan. All of this occurred in August, 1979, before this Court's decision in *Nachman* and a year before passage of MPPAA. The chain of events could not be reversed later because it is illegal to force union representation on employees when a majority of those employees do not desire to be represented by the union.[8]

The effort to explain why withdrawal liability here is not retroactive simply underscores the merit of CP&P's position. CLPT has quoted to the Court various documents which strictly limit contributing employer liability to the amount of the hourly contribution in the collective

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[8] 29 U.S.C. § 157.

bargaining agreement.[9] CLPT has never defaulted on any loan or other obligation or failed to pay a pension benefit when due.[10] CLPT has never been financially incapable of paying any scheduled benefit to any of its beneficiaries. J.A. 79 at ¶ 26. In fact, CLPT's records reflect that the fund was earning or obtaining more funds as assets than it paid out on benefits during every year of its existence from 1962 through 1981 with one exception. J.A. 342-343; *see also* R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 21. Thus, there is nothing in the records of CLPT which is inconsistent with all parties' belief that CLPT was telling the truth when it said it was a defined contribution plan. Nothing would have led an inquiring employer to believe that participation was likely to lead to potentially catastrophic liability at the time of withdrawal even under the pre-MPPAA rules of ERISA which were not mandatory.

C. There Is No Link Between CP&P Or Its Employees and CLPT's Underfunding.

There is no stretch of the facts which permits a conclusion that the unfunded vested liability of CLPT is attributable to CP&P participation. CLPT concedes that its unfunded liability is attributable, among other things, to past service credit for hours worked as long ago as 1937, even though no contributions were made to fund those credits at the time the plan was created in 1963.[11]

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[9] *See* J.A. 80-81 at ¶¶ 32, 33, and 34.

[10] J.A. 79 at ¶ 25.

[11] Perhaps as important, a year of credited service for these past service credits was worth $2.67 a month in 1963. The maximum benefit regardless of years of service was $53.40. Following the 1980 benefit increase, a year of past service credit was increased in value to $35.64 per month with no maximum pension amount. CLPT Br. at p.8.

Since CP&P did not exist until December, 1976, none of the past service credits are attributable to its employees or its operations. No increase in benefits occurred while CP&P was producing pipe and contributing to the plan. Thus, none of the unfunded benefits existing in the plan can be said to be CP&P's fault or responsibility.

As importantly, even if it is assumed contrary to fact that any CP&P employee was earning vested service, CP&P paid more than adequate contributions to cover the cost of benefits earned plus the administrative expense. CP&P contributed $1.20 per hour for each covered hour of service. J.A. 76 at ¶ 10. CLPT's actuary computed that it cost 57.7¢ per hour to fund the pension benefit (even after the 1980 increase) for the employee who worked the hour that generated the contribution, and 7.1¢ per hour to administer the plan.[12] Thus, CLPT's cost for providing the benefit to the employee who worked the hour resulting in the contribution was 64.8¢ per hour.

CLPT used CP&P's extra 55.2¢ per hour to pay for unfunded vested benefits in the trust prior to CP&P's creation.[13] Thus, if viewed from the perspective of the liabilities attributable to CP&P or its employees, it is clear that CP&P has funded those benefits with hourly contributions nearly twice that required to pay for the benefit and administrative costs.

Amicus N.C.C.M.P asserts accurately that "each withdrawing employer pays for the unfunded vested benefits

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[12] CLPT Br. at p. 11; *see also* R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 24.

[13] CLPT Br. at p. 11; *see also* R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 24.

of employee-participants which are not necessarily its own."[14] *Amicus* Central States takes this concept one step further: "the statute does not, and was not intended to, impose liability with mathematical precision to account for an employer's own employees' earned benefits."[15] The position staked out by CLPT, PBGC, and the other *amici* is that CP&P's "fair" or "proportionate" share of unfunded vested liability can be unrelated either to the benefits to be paid to CP&P employees, the extent CP&P funded the benefits or the amount of liability CLPT incurred as a result of CP&P's conduct.

Thus, there is no dispute that CP&P is being assessed withdrawal liability to pay for pre-ERISA retirement benefits for other employers' employees. Of course, even if CLPT wins, the CP&P assets seized would not be used to fund vested liability. Instead, these assets will be used to pay for benefit increases for other employers' employees. CLPT's actuary admitted that key assumptions are designed to achieve this result. J.A. 223. CLPT's unfunded liability remains at approximately the same $500 million level as existed in 1981.[16] Indeed *Amicus* Central States has told Congress that it believes it has a fiduciary duty to increase benefits when additional contributions are received rather than to reduce the unfunded liability.[17]

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[14] N.C.C.M.P. at p. 7 n. 2.

[15] Central States Br. at p. 6.

[16] *See* Daily Labor Report (BNA) No. 145, at A2-A3, (July 28, 1992).

[17] Hearings on P.B.G.C. Premium Program, before the Subcommittee on Oversight, Committee on Ways and Means, U.S. House of Representatives, August 1, 1991 (Testimony of Ronald J. Kubalanza, Executive Director, Central States, Southeast and Southwest Areas Pension Fund, at p. 4).

The withdrawal liability assessment here is unconstitutional because CP&P, under these circumstances, is no different from any other citizen of the United States. There is no escape from the conclusion that if this Court upholds MPPAA, as applied here, it must do so recognizing that CP&P is being charged with a bill completely divorced from its conduct and which, if paid, will fund the pensions of other people's employees.

D. The Withdrawal Liability Formula Is Irrational As Applied.

There are two perspectives from which to examine the formula as applied to CP&P. One can examine the actual financial impact which CP&P's participation in CLPT had on the unfunded vested liability. Alternatively, the Court can conclude that Congress intended to fix the PBGC funding problem created by ERISA by taking assets from CP&P for the purpose of funding retirement benefits to people CP&P never heard of based on a promise which Congress, not CP&P, made. If this latter approach is used, the conclusion that there is an unconstitutional taking, as applied, becomes virtually unescapable.

CLPT and PBGC attempt to support the rationality of the withdrawal liability formula with three arguments which are simply not supported by the facts. First, CLPT claims that there is no evidence that the formula adversely impacted upon CP&P. Second, CLPT claims that increased contributions lead to increased benefits by CP&P's employees.[18] Third, PBGC claims that, in the long

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[18] Based upon undisputed facts, CLPT's argument is incorrect. CLPT notes: "the pension benefit payable for one who retires is a flat monthly benefit multiplied by the number of

run, contributions will approach the value of liabilities attributable to the contributing employer.[19]

1. CP&P Is Harmed By The Formula.

CP&P was clearly harmed by the irrational linkage between contributions and presumed liabilities. The example of doubling the contributions to demonstrate the irrationality of the statute was not selected arbitrarily. 54% of CP&P's contributions were estimated to be needed to fund the pension benefit and administrative cost pursuant to CLPT's actuary. CLPT used the remaining 46% of contributions to achieve other goals. If the amount CP&P contributed in excess of that necessary to fund the benefit plus administrative cost is subtracted from CP&P's total contributions and the liability recalculated, the resulting withdrawal liability drops to less than $55,750.00.[20] Thus the suggestion that CP&P has not suffered from the payment of contribution levels higher than those which

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years of credited service." CLPT Br. at p. 7. There is nothing in the formula which links the amount of monthly pension benefit the retires receives to the amount his employers contributed per hour on the employee's behalf. Indeed, the absence of this linkage is the crux of the problem.

[19] The facts of this case demonstrate both the fallacy of this concept and the PBGC's true belief about the reckless behavior of CLPT's trustees. The only way this prophecy can come true is if CLPT granted benefit increases which are so large that they consume CP&P's funding and are otherwise unjustified by the assets of the plan.

[20] The precise number is either $55,737.90 or $55,702.72 depending on whether the contributions in excess of those need to fund and administer the benefit are also deducted from gross contributions. See Appendix to Reply Brief.

CLPT's actuary computed were necessary to pay for the benefit and administrative cost is simply false.

2. Pooling Of Assets vs. Pooling Of Liabilities.

PBGC argues that "pooling" is an integral part of all multiemployer plans and thus this formula is rational. Although the support for this proposition is dubious,[21] the argument has no impact here. CP&P paid fully for any benefits it may have received from CLPT. Individual account plans (like that which CLPT held itself out to be) pool assets to maximize gains through investment but generate no "pooled" employer liability.

CP&P paid nearly half of its hourly contribution rate for the "privilege" of participating in this arrangement. The suggestion that somehow this near double payment was insufficient is arbitrary and irrational, as is the formula which leads to this situation. As applied, the "real and substantial relation" between the means Congress selected and the goal it sought to obtain is clearly lacking. *See Nebbia v. New York*, 291 U.S. 502, 525 (1934).

III.

THE TAKINGS ISSUE

The purpose of forbidding uncompensated takings of private property for public use is to bar government from forcing some people alone to be public burdens which, in

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[21] The Court specifically rejected use of the pooling concept as a justification for imposing pension liability on all employers in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 357 (1935). The Court had the opportunity to repudiate *Alton* and its reasoning on this point in both *Connolly* and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and took some care to avoid doing so.

all fairness and justice, should be borne by the public as a whole. *Connolly*, 475 U.S. at 227 (1986); *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Long ago, this Court held that:

> There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or *to pension its employees*. (Emphasis added.) *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 357 (1935).

This Court was quite specific in *Connolly* in noting that it was unprepared to find that MPPAA *always* perpetrated a taking which would require compensation under the Fifth Amendment. Similarly, the Court did not find that MPPAA could *never* perpetuate a taking requiring compensation.

Having had all manner of arguments attributed to CP&P by respondent and its *amici*, it is important to define that which this Court need *not* do to grant CP&P relief. First, the Court is not asked to return to the *Lochner*[22] era, or resolve squabbles between the various parties submitting Amicus Briefs.[23] The court need not reverse *Connolly*, *Gray* or *Nachman*. Finally, this Court need not adopt broad or sweeping rulings which would

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[22] *Lochner v. New York*, 198 U.S. 45 (1905). CP&P is also unprepared to concede that all of this Court's constitutional decisions during this period were so fatally flawed that no degree of consideration of these cases is appropriate.

[23] Thus, the Court need not decide the dispute between *amici* MPPAA Solvency Coalition and Central States as to whether the latter is a well run operation or very large Ponzi scheme. Similarly, Central States' quarrel with Lady Baltimore Foods and its views on the merits of the issues in *Local 144 Nursing Home Pension Fund v. Demisay*, No. 91-610, have no bearing on this dispute.

vitiate the integrity of the multiemployer pension plan system as CLPT's *amici* suggest.

The Court will need not define the constitutional limit on compelling citizens to pay for unrelated economic burdens Congress created. The Court should decide what "fair share of the Plan's unfunded liabilities"[24] means in the context of this small employer with a brief contribution history and no role in underfunding. If the fair share is defined as paying for actual or even potential liabilities which the employer leaves behind at withdrawal, it is clear that CP&P's hourly contributions were more than sufficient and seizure of anything more could not be for the purpose of funding a "fair share." If, on the other hand, "fair share" in this context means that an employer like CP&P must pay for other employers' employees, then the statute is clearly shifting to private individuals burdens which should be borne by the public at large.

CLPT's emphasis on the fact that ERISA (as opposed to MPPAA) existed before CP&P began contributing to avoid the obvious retroactivity of MPPAA, as applied, is misplaced. It is difficult to conceive of a set of documents drafted to confirm more clearly the intention of all parties that a pension plan be an individual account rather than a defined benefit plan.

The concerns of some members of Congress as restated in the *Connolly* concurrence have proven to be prophetic understatements. Representative Erlenborn was concerned that MPPAA may have:

> Taken something that neither looked like a duck, or walked like a duck, or quacked like a duck, and we passed a law [ERISA] and said "It

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[24] *Connolly*, 475 U.S. at 231 (O'Connor, J. and Powell, J. concurring), quoting *Gray*, 467 U.S. at 723 n.3.

> is a duck." . . . It is treating the multi-employer plans where you negotiate a contribution as having put a legal obligation on the employer to reach a level of benefits that has caused the problem.[25]

Here, not only did CLPT not look like a defined benefit "duck," walk like a defined benefit "duck," or quack like a defined benefit "duck," this beast further *declared* to all potential contributing employers that it was not a defined benefit "duck" and would not become a defined benefit "duck" so long as ERISA permitted defined contribution or individual account plans which both ERISA and MPPAA permit. The claim that CP&P should have known in 1976, 1978, or the date it made its last contribution that CLPT was a defined benefit plan is simply unsupportable.

IV.

PROCEDURAL DUE PROCESS

There is a difference between a burden of proof and a barrier to proof. Similarly, there is a difference between proving the existence of a fact and disproving the accuracy of a belief.[26] The problem with the 29 U.S.C. § 1401 presumptions[27] is that CLPT is permitted and encouraged

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[25] *Connolly*, 475 U.S. at 234 (O'Connor, J., and Powell, J. concurring).

[26] For example, whether a church or temple physically exists is a fact. Whether the religious practices which occur inside the structure are "correct" or "reasonable" is a belief which is impervious to objective verification in this world.

[27] All the 29 U.S.C. § 1401 presumptions are at issue. The District Court reviewed the arbitrator's decision applying both sets of arbitrator presumptions. J.A. 419, 423. The arbitrator applied the actuarial presumptions (J.A. 400) and refused to consider the constitutionality of the presumptions generally. J.A. 386. The arbitrator's decision does not disclose the extent to which the 29 U.S.C. § 1401(a)(3)(A) presumption influenced the outcome of his decision. Clearly, if one or more of the presumptions is found unconstitutional, the entire withdrawal liability assessment mechanism may fail or be severed. Thus, CP&P strongly disagrees with the assertion by CLPT and its *amici* that the date of withdrawal is a dead issue.

to convert its beliefs or predictions about the future into irrebuttable facts.[28] A withdrawing employer is required to prove that CLPT's prediction of the future cannot possibly come true.

A. The Trustees are Biased Decisionmakers.

The contention that CLPT does not engage in biased judicial or quasi-judicial decision making is inaccurate. CLPT's bias against withdrawing employers like CLPT is inherent. As this Court held, CLPT's trustees owe fiduciary duties to the trust which are "antithetical" to the interests of the contributing employers. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334 (1981). Under CLPT's view of MPPAA, the withdrawing employer is cutting the plan off from a stream of income, and the trustees' duty is to seize assets equivalent to that income stream in the form of

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[28] There is no dispute that CP&P has the right to an impartial decisionmaker. CLPT claims that it is not a decisionmaker and, somewhat half-heartedly, that it is not biased. PBGC echoes this assertion and adds that the plan actuaries, not the trustees, make the decision. The briefs of the Philadelphia Teamsters Pension Trust and the Central States Teamsters' Pension Trust add little new material. However, the difficulty which the various Teamsters Pension Trusts seem to be having among themselves as to whether the presumptions are even important underscores the fact that this issue is more complex than a simple squabble over the burden of proof.

withdrawal liability. As importantly, CLPT's abuse of interest rate assumptions to fund future benefits at the expense of withdrawing employers should be more than adequate to establish CLPT's bias against withdrawing employers. The existence of fiduciary duties "antithetical" to CP&P *is* bias.

As to the trustees' "decisionmaker" status, CLPT and its *amici* have it exactly backwards. Absent the presumptions, CLPT would not be a judicial decisionmaker for Fifth Amendment purposes. However, when the district court presumes that the arbitrator is correct, and the arbitrator presumes that CLPT is correct, the cascading presumptions transfer the judicial decision making authority back to the CLPT trustees.[29] Another way the court can dispatch the "lack of decisionmaking" argument is by noting that neither CLPT nor any of its supporting *amici* can discuss the lack of judicial decisionmaking without referring to the trustees' "determination" in the next breath.

The question is not whether CLPT is biased or a judicial or quasi-judicial decisionmaker. Rather the question is whether something in the MPPAA dispute resolution structure insulates withdrawing employers from that bias in the way that the *de novo* hearing insulated employers from the bias in *Marshall v. Jerrico*, 446 U.S. 328 (1980). The answer is that there is no such protection.

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[29] This situation is easily distinguished from *Marshall v. Jerrico, Inc.*, 446 U.S. 328 (1980). In *Marshall*, the Department of Labor penalty was reviewed *de novo* by an administrative law judge. Here, no phase of a MPPAA dispute occurs *de novo*.

B. The Presumptions Are Not Mere Burdens of Proof.

The argument that the presumptions are simply burdens of proof conflicts with the plain meaning of the statutory language. CLPT trustees, for example, have a duty to use reasonable actuarial assumptions.[30] Absent the presumptions, this duty would still exist and the question would be whether CLPT or CP&P had the burden of proof regarding reasonableness.[31] The presumptions in 29 U.S.C. § 1401 are different.

The presumptions are analytical armor which shield the plan's decisions from close scrutiny as Congress clearly intended. Thus, as difficult as many of the withdrawal liability factual questions and actuarial assumptions are when viewed objectively, the presumptions become barriers to proof because of the inherent subjectivity involved. Whether CP&P withdrew before or after MPPAA's effective date is a factual question, but the components which go into deciding that question against CP&P here focused on CLPT's beliefs regarding CP&P's intentions. The interest rate actuarial assumption is intensely subjective and tends to be impervious to challenge within an unacceptably broad range of reasonableness. That PBGC has delegated its authority to set objective standards by inaction certainly does not help matters. *See* PBGC Br. at p. 7. It is the armor plating that the presumptions place on CLPT's determinations which renders the presumptions an unconstitutional denial of procedural due process.

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[30] 29 U.S.C. § 1393(a).

[31] Indeed, this was the process and the issue in *Vinson & Elkins v. C.I.R.*, 99 T.C. No. 2, 15 E.B.C. (BNA) 1811 (1992).

That a few withdrawing employers have triumphed in limited areas does not eliminate the inherent constitutional infirmity. The listing of arbitration decisions where the employer prevails serves only to indicate how rare this event is and the narrowness of the available areas of challenge. Few of these cases reflect instances where the interest rate assumption has been successfully challenged. So long as the "range of reasonableness" for interest rate assumptions can result in either a fully funded plan or one which has serious unfunded liability depending on the actuaries belief structure, the presumptions and the inherent bias of the trustees remain a problem of constitutional dimension.[32]

C. The Interest Rate Assumption.

The most conceptually difficult presumption is that which protects the interest rate actuarial assumption.[33] CP&P has no quarrel with the actuarial profession or its professionalism within the bounds of what actuaries do. Nonetheless, the methods which actuaries use tend to cause the mind's eye to glaze over and obscure the subjectivity of the interest rate assumption and its inherent limitations. The parties here may disagree as to what the rate should be, but there is no denying the fact that the

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[32] Compare, for example, *Classic Coal Corp. v. U.M.W. 1950 and 1974 Pension Plans*, 5 E.B.C. (BNA) 1449 (1984) (Nagle, Arb.) with *Palmer Coking Coal Co. v. U.M.W. 1950 and 1974 Pension Plans*, 5 E.B.C. (BNA) 2369 (1984) (Gordon, Arb.) where two arbitrators examined the same plan and assumptions but came to opposite conclusions regarding the reasonableness of the same interest rate.

[33] 29 U.S.C. § 1401(a)(3)(B).

outcome is simply an educated guess about the future. CLPT Br. at p. 29.

The only way to counter one belief in this regard is to present another. Absent an objective benchmark in the form of PBGC regulations, arbitrators either defer, pursuant to the presumption, to the plan actuary's guess about the future as happened here, or reject that guess and pick a different number. *See Woodward Sand Co. v. Operating Engineers Pension Trust*, 3 E.B.C. (BNA) 2351 (1982) (Kaufman, Arb.) (arbitrator concludes 6.5% is unreasonable, but 7.9% is reasonable without any analysis).

Two cases illustrate the problem. *Carnation Co., Inc. v. Central States Pension Fund*, 9 E.B.C. (BNA) 1409, 1438-1444 (1988) (Nagle, Arb.) recounts how four different actuaries applying four different approaches derived four different best estimates of the appropriate interest rate to be used ranging between 7.6% and 12.89%.[34] Each of the actuaries were, no doubt, upholding the highest standards of the profession, yet came to radically divergent outcomes. All claimed to be within the "range of reasonableness," but each set of assumptions would result in a significant change in the amount of the withdrawal liability.

The other case is *Vinson & Elkins v. C.I.R.*, 99, T.C. No. 2, 15 E.B.C. (BNA) 1811 (1992).[35] Like CP&P, the IRS has an interest in seeing that the interest rate assumptions are not unreasonably low. IRS asserted that the plan's interest rate

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[34] Thus, the "range of reasonableness" between 7.5% and 14.5% noted in *Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1137, 1150 (1st Cir. 1985) (Aldrich J., dissenting) is neither unusual nor aberrational.

[35] CP&P agrees that the standard governing actuarial assumptions for tax purposes under 26 U.S.C. § 412(c)(3)(A) is virtually identical to the standard for withdrawal liability assumptions in 29 U.S.C. § 1393(a).

assumptions were too low relying, *inter alia,* on testimony from an actuary who used the same methodology as CP&P's actuary here.[36] IRS, unhindered by the statutory presumption, was unable to overcome the standard because of the inherent subjectivity of the belief structure necessary to assume a future interest rate.[37] The significance of *Vinson & Elkins* is not the outcome, but rather that the IRS and PBGC disagree on what is reasonable, and both agencies apply virtually identically worded statutes.

V.

CONCLUSION

CP&P respectfully urges the Court to reverse the decision of the Ninth Circuit in this case.

Dated: October 9, 1992

Respectfully submitted,

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[36] *See, Vinson & Elkins,* 15 E.B.C. at 1820-1821, 1826-1827.

[37] Ironically, one of the excuses used for discounting the reliability of the IRS' actuary who used the same methodology as CP&P's actuary was that the IRS actuary's primary experience was with large multiemployer plans like CLPT. Thus CP&P's actuary was ignored because his experience was primarily in non-multiemployer plans and the IRS' actuary was ignored in a single-employer situation because of that actuary's multiemployer experience when both actuaries used the same emthodology.

APPENDIX

Withdrawal Liability Worksheet Assuming CP&P Hourly Contribution of 64.8¢ per hour[1]

1. CP&P contributions to CLPT during the five years ending:

			Source
a.	December 31, 1979	$55,434.607	(J.A.376,1a x .54)
b.	December 31, 1980	$55,460.851	(J.A.376,1a x .54)

2. Aggregate contributions of all employers contributing to CLPT during the five years ending:[2]

a. December 31, 1979 $273,502,478.00 (J.A.376,2a - $47,222.08)

b. December 31, 1980 $320,419,755.00 (J.A.376,2b - $47,244.43)

3. CP&P Percentage of total CLPT contributions:

a.	Divide 1a by 2a	.000202684
b.	Divide 1b by 2b	.000173088

4. CLPT aggregate unfunded, vested liability pools as of December 31, 1980:

a.	Pool as of December 31, 1979	$468,656,500.00	(J.A.58,4a)
b.	Pool as of December 31, 1980	$45,524,700.00	(J.A.58,4b)

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[1] Cost estimated by CLPT to provide and administer the benefit. CLPT Br. at p. 11.

[2] Total contributions minus the difference between actual contributions by CP&P and contributions assumed in this schedule.

5. CP&P estimated withdrawal assessed before the offset is determined as follows: (J.A.58,5)

a.	Line 3a multiplied by line 4a	$ 94,989.17
b.	Line 3b multiplied by line 4b	7,879.78
c.	Total of 5a and 5b	$102,868.95

6. Offset amount:

– If line 5c exceeds $100,000 but is less than $150,000, then the offset amount equals $50,000 minus the amount by which line 5c exceeds $100,000; for example, if line 5c equals $130,000, then the offset amount equals $20,000.[3]

7. CP&P estimated withdrawal assessment equals line 5c less line 6. $55,737.90[4]

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[3] J.A. 58-59

[4] If amounts deducted from J.A. 376 line 1a and 1b are also deducted from lines 2a and 2b the formula reduces the line 7 total to $55,702.72.

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

No. 91-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR MIDWEST MOTOR EXPRESS, INC., THE MPPAA SOLVENCY COALITION AND THE NATIONAL TANK TRUCK CARRIERS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR MIDWEST MOTOR EXPRESS, INC., THE MPPAA SOLVENCY COALITION AND THE NATIONAL TANK TRUCK CARRIERS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

Midwest Motor Express, Inc. ("MME"), is an interstate motor carrier of freight operating with terminals in nine mid-western states. MME has been operating under a multiemployer collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters") covering approximately 170 employees. Currently involved in a labor dispute, MME faces a potential withdrawal liability that could destroy its economic viability and commercial existence if it is unable permanently to negotiate a new collective bargaining agreement.

The MPPAA Solvency Coalition ("the Coalition") is comprised of employers (and employer trade associations with member companies) who contribute to multiemployer pension plans in the trucking, construction and stevedoring industries. The Coalition is concerned about chronically underfunded defined-benefit multiemployer pension plans and the ability of trustees arbitrarily to increase pension benefits, especially in the trucking industry, where many employers are subject to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"). 29 U.S.C. § 1381-1461.[1] For several years, the MPPAA Solvency Coalition has been educating Congress and other policy makers on the severity of the problem and the need for relief.

National Tank Truck Carriers, Inc. ("NTTC") is a not-for-profit trade association whose 200 member companies specialize in the for-hire transportation of bulk materials throughout the continental United States. Many members negotiate collective bargaining agreements with the Teamsters and based upon these agreements make contributions to various multiemployer plans.

As participants in multiemployer pension plans, MME and members of the Coalition and NTTC, are subject to the withdrawal liability provisions of the MPPAA. Many of these employers participate in the Teamsters' Central States Southeast and Southwest Areas Pension Fund ("Central States"), which is a large severely underfunded multiemployer pension plan.[2] Because these em-

[1] In a highly competitive industry beset by the current economic downturn, many trucking industry employers fear they will be forced out of business and have their remaining assets stripped away by the imposition of withdrawal liability which bears no rational relationship to their reasonable expectations.

[2] Central States had an unfunded vested benefit liability of approximately $1.7 billion at the end of 1990. *Central States Southeast and Southwest Areas Health And Welfare And Pension Funds*, 1990 Annual Report at 5. *See* text *infra* at 13-17.

ployers have no influence or control over the actions of the trustees of Central States in determining or increasing benefits, the resulting withdrawal liability to which they are subject bears no reasonable relationship or rational connection to their expectations or commitments under collectively bargained contracts or under the MPPAA.

Accordingly, *amici* have a vital interest in the resolution of the constitutional issues raised under the MPPAA in this case. *Amici* believe they will bring insights and information beyond what is presented by Petitioner and Respondent, which will be useful to this Court in deciding the issues presented.[3]

STATEMENT

This case involves the constitutionality of various provisions of the MPPAA, including questions left open or reserved by this Court in *PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987) and *Connolly v. Pension Benefit Guarantee Corporation*, 475 U.S. 211 (1986). *Amici* endorse the view that "the withdrawal liability scheme and the procedural mechanisms involved in it are matters of economic life and death to many employers." Pet. at 8. As Petitioner also noted, unless the constitutional issues surrounding the MPPAA are addressed favorably, the imposition of withdrawal liability will continue to deter entry of new employers into these multiemployer plans, especially those with substantial unfunded liabilities. Pet. at 18.

The purpose of the MPPAA is to alleviate problems that discourage the maintenance and growth of multiemployer plans, to protect participants and beneficiaries of distressed multiemployer plans, and to provide a financially self-sufficient program for the guarantee of pension benefits under multiemployer plans. 29 U.S.C.

[3] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of the Court.

§ 1001a (c)(2)-(4). As set forth in this brief, the MPPAA's processes, as applied in certain circumstances, have assured that these legislative goals cannot be reached. The multiemployer defined-benefit system has begun to collapse, while the multiemployer defined-contribution system, which is not covered by the MPPAA, is expanding. U.S. Department of Labor, *Trends in Pensions 1992*, Tables A-1 and A-2 at 590 and 592.

SUMMARY OF ARGUMENT

Respondent's contentions, that the Section 1401 presumptions do not deprive the employer of its right to fully challenge pension plan trustee determinations before an impartial arbitrator, and that trustees do not suffer institutional bias, plainly are wrong. The philosophy and analysis of *United Retail & Wholesale Employees Teamsters Union Local 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3rd Cir. 1986), *aff'd by an equally divided Court sub nom.*, 481 U.S. 735 (1987), again should be embraced by this Court. The legal and practical effects of the powers and presumptions of the MPPAA deny employers their due process Fifth Amendment rights to an impartial decision-maker—thereby rendering their burden not only onerous and insurmountable, but also legally untenable. *See Yahn*, 787 F.2d at 136. *See also* Connolly, *The Powers and Presumptions of the MPPAA: An Unconstitutional Combination?*, The Labor Lawyer, Vol. 3 (1987) at 83-84.

As recognized in *Yahn*, the series of presumptions contained in § 1401 of the MPPAA flow unfailingly and irrefutably in favor of the trustees. Perhaps the most significant of these presumptions relates to the calculation of withdrawal liability. As in the instant case, the withdrawing employer has no means of meeting the presumptions Congress has imposed upon it and, as a result, the employer is denied any impartiality or effective procedural due process.

Moreover, in *Connolly*, Justice O'Connor's concurring opinion focused on the potential for withdrawal liability to be held unconstitutional as applied, where there is no rational connection between collectively-bargained contributions, or with an employer's reasonable investment expectations, and a determination of withdrawal liability. In certain circumstances, the Court should conclude that the absence of such a rational connection violates the Due Process and Taking Clauses of the Fifth Amendment.

This Court should articulate the following standards under *Connolly*, for evaluating whether the MPPAA may be unconstitutional, *as applied*, where the imposition of withdrawal liability is attributable to:

(1) past unfunded vested benefits for which an employer did not ensure full funding; (2) contribution or benefit levels over which an employer has no effective control to ensure full funding, or (3) benefit increases over which an employer has no effective control to ensure full funding.

Judged against these standards, we submit that the MPPAA is unconstitutional as applied to Petitioner, and to other similarly situated employers.

ARGUMENT

I. THE § 1401 PRESUMPTIONS VIOLATE THE DUE PROCESS CLAUSE BY DENYING WITHDRAWING EMPLOYERS ACCESS TO AN IMPARTIAL DECISION-MAKER.

A. The Effect of the Statute.

The MPPAA process, delegating all initial determinations to fund trustees, becomes constitutionally flawed when coupled with the statutory presumptions accorded these determinations. The overall process denies due process of law because no neutral party ever reviews trustee determinations—no matter how unlawful, erroneous, or conflict of interest driven. Short of appellate review, the impartial adjudication required by the Fifth Amendment is nothing more than a hollow promise.[4]

Employer disputes with trustee determinations frequently involve more than just the mathematical computations involved in calculating an employer's withdrawal liability. As in the case before the Court, the initial determination that MPPAA and withdrawal liability apply in the first place may be erroneous. And, trustees often ignore the MPPAA provisions that are exculpatory in nature.[5]

Any of these initial trustee determinations are enough to overwhelm employers forced to arbitrate against trus-

[4] Federal courts have been loath to upset MPPAA's dispute resolution/arbitration provisions, and seldom grant equitable relief to an employer harmed by trustee determinations. *See, e.g., Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241 (3rd Cir. 1987). When equitable relief is not granted, trustee determinations, no matter how legally questionable, are certain to prevail.

[5] For example, trustees often send out notices of withdrawal during a labor dispute (such as one recently received by MME) which place undue pressure on the employer during a period of difficult collective bargaining. Except in rare instances, trucking plans have ignored the special trucking industry withdrawal rule thereby thwarting the Congressional mandate. See 29 U.S.C. 1383(d).

tee allegations presumed correct by the MPPAA. The lengthy administrative proceedings in a non-neutral forum provided by the MPPAA deny employers their due process rights.

B. The Compulsory Bias of the Statute.

Withdrawal liability is based upon a plan's "unfunded vested benefits," calculated as the difference between the present value of vested benefits and the present value of the plan's assets. 29 U.S.C. §§ 1381, 1391. Under the MPPAA, employers are liabile to a plan for their allocable share of the plan's unfunded vested benefits. 29 U.S.C. § 1381(b). The trustees of a plan decide whether a withdrawing employer is liable to the plan under the MPPAA and assess the amount of the liability. *Id.* § 1382.[6]

The initial withdrawal determination by the trustees controls the subsequent process, despite the trustee's compulsory statutory bias under the MPPAA.[7] In addition, the trustees' dual roles under MPPAA create opportunities to advance partisan interests. Withdrawal liability is one of the unions' biggest weapons in collective bar-

[6] As discussed *infra* at 10-17, the trustees of a plan may also have exclusive control of the level of unfunded vested benefits of the plan, where an employer has no effective control of benefit levels or increases. Generally, it is the trustees who, in addition to managing the plan, set benefit levels and benefit increases. *See Connolly v. PBGC*, 475 U.S. 211, 232, citing GAO/HRD-85-58, Comptroller General's Report to the Congress, *"Effects of the Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits,"* 37, App. 1, Table 3 (June 14, 1985) (95% of 139 multiemployer plans surveyed provided that trustees set benefits).

[7] Under ERISA, the trustees' fiduciary duties are solely to the pension plan, and not to any particular employer. 29 U.S.C. § 1104(a)(1)(A). *See also Yahn & McDonnell, Inc., supra*, 787 F.2d 128 (3d Cir. 1986); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981) (trustees in a multiemployer plan owe an *exclusive* duty to the fund).

gaining because the liability is triggered if an employer is unable permanently to negotiate a new agreement. Union trustees, who usually are union leaders, may be tempted to threaten withdrawal liability for partisan reasons unrelated to plan management. Moreover, employer trustees who remain contributing employers have an incentive to reduce their future burden for unfunded vested benefits and to reduce competition from a withdrawing employer with limited resources by maximizing the amount of withdrawal liability attributable to the withdrawing employer.[8] Consequently, when the trustees determine withdrawal liability, they stand to gain the most by a large assessment. Therefore, trustee determinations cannot reasonably be presumed to be impartial. Nonetheless, this is the effect of the combined statutory presumptions contained in § 1401.

Aribitration does not occur *de novo*, rather the determination is presumed correct under the MPPAA. 29 U.S.C. § 1401(a)(3)(A). Judicial review of the arbitration award, in turn, is very limited in scope. In effect, unless the employer shows, by a preponderance of the evidence, that the trustee's determination was "unreasonable or clearly erroneous," the liability will be sustained in arbitration and or upon judicial review. 29 U.S.C. § 1401(a)(3)(A). *See Trustees of the Pressman Local 72 Industry Pension Fund v. Judd & Detweiler, Inc.*, 735 F. Supp. 135, (D. Md. 1988).

Similarly, the arbitrator's scope of review of the critical determination of the plan's unfunded vested benefits is presumed correct,[9] unless the employer shows by a pre-

[8] *See* Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multiemployer Pension Plan Amendments Act of 1980*, 71 Geo. L.J. 161, 168 (1982).

[9] The MPPAA's presumptions extend to trustee determinations of the unfunded vested benefit liabilities of a plan upon which

ponderance of the evidence that the actuarial assumptions and methods "were, in the aggregate unreasonable . . . ," or that the plan's actuary "made a significant error" in applying the methods or assumptions. 29 U.S.C. § 1401(a)(3)(B).[10]

Charging trustees with the statutory power and incentive to maximize withdrawal liability, while providing employers, on whom the liability is imposed, with no meaningful procedural safeguards, violates procedural due process. *See Yahn*, 787 F.2d at 137-38. Although this Court's evenly divided opinion allowed that decision to stand, it has not become the law of the land.

It is astounding that, as in Petitioner's case, the actuary who determines the plan's unfunded vested benefits, and represents only the plan trustees and is paid by them, also later calculates the withdrawal liability of employers. All of these determinations are then presumed to be correct. Yet, it is a withdrawing employer, not the actuary or trustees, who bears the risk of withdrawal liability attributable to underfunding based upon the actuary's assumptions or upon benefit levels or benefit increases set by the trustees. The employer is excluded from this process and has no control over the factors affecting the funded position of the plan, including: interest rate assumptions; asset valuations; additional benefit accruals; benefit level increases; and investment experience. Therefore, it is patently unfair to presume that the actuary's calculations of unfunded vested benefits and employer withdrawal liability are correct, and to bar *de novo* review of those calculations.

withdrawal liability calculations are based. *See Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641 (N.D. Ill. 1986).

[10] *See Penn Textile Corp. and Textile Workers Pension Fund*, 3 E.B.C. 1609 (1982) (wherein arbitrator upheld a 6% interest rate assumption by the trustees); *See also Judd & Detweiler, supra* (use of 6% interest rate instead of 6.5% increased employer's withdrawal liability from zero to $132,775).

Furthermore, to the extent that benefit levels and benefit increases are not negotiated by an employer in collective bargaining, they are totally outside of the employer's control. This results in a highly attenuated relationship between the calculation of withdrawal liability and the employer's reasonable expectations. Nevertheless, it is the employer who is subject to withdrawal liability attributable to underfunding based upon these factors.

Accordingly, the MPPAA scheme fails to provide "a neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972). Moreover, *de novo* judicial review by an impartial and disinterested decision-maker is also missing. *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242-43 (1980).

Consequently, we believe that the Third Circuit's ruling in *Yahn* is correct. This Court should take the opportunity provided by the instant case to establish these principles firmly for the future.

II. THE MPPAA, AS APPLIED, VIOLATES THE FIFTH AMENDMENT WHERE THE AMOUNT OF WITHDRAWAL LIABILITY BEARS LITTLE OR NO RATIONAL RELATIONSHIP TO THE CONTRIBUTIONS AND/OR EXPECTATIONS OF THE EMPLOYER.

A. The Standard.

This Court has upheld the retroactive provisions of the MPPAA under the standard that they are a rational means to a legitimate legislative end. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). In *Gray*, this Court adopted the standard in *Usery v. Turner Elkhorn*, 428 U.S. 1 (1976), for both prospective and retroactive legislation. Therefore, legislation "adjusting the burdens and benefits of economic life" is presumed constitutional and will not violate the Due Process Clause, unless Congress has acted in an "arbitrary way." *Turner Elkhorn*, 428 U.S. at 15.

Under this standard, the Court has found no *facial* constitutional problem with the MPPAA. *Connolly v. Pension Benefit Guarantee Corporation*, 475 U.S. 211 (1986). Nevertheless, as applied to Petitioner and other employers, *amici* believe that this Court's decision in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935) "retains vitality." *See Gray*, 467 U.S. at 733-34; *Turner Elkhorn*, 428 U.S. at 19. In *Alton*, the Court invalidated provisions of the Railroad Retirement Act of 1934 that required employers to finance pensions for former railroad employees. Analogous to *Alton*, the MPPAA requires employers to finance pension benefits retroactively, and creates liabilities where none should exist. In this case, where the question is whether the MPPAA is unconstitutional as applied, *Gray* is not absolute and this Court should distinguish *Gray* and apply *Alton*.

B. Application of the Standard under the MPPAA.

As applied, the MPPAA exceeds the rational bounds of Congress' legislative goals. The statute, in effect, operates to hold employers liable for pension benefits often "created" entirely outside of their control. *See Alton*, 295 U.S. 330 (1935). Congressional intent may have originally required that employers shoulder the responsibility for their proportionate share of withdrawal liability; but, in reality, this is a legal fiction—there are no checks and balances on the creation of benefits by the trustees and, thus, artificial withdrawal liability is routinely assessed against many employers and collected from them by the trustees. Accordingly, in certain circumstances, there is no reasonable relationship between assessed liability and the employer's contributions to the plan or expectations under the terms of the plan.

We assert that the concurring opinion of Justices O'Connor and Powell in *Connolly* correctly identifies the

appropriate Fifth Amendment principles. *See Connolly*, 475 U.S. at 228-236. Withdrawal liability assessed for the benefit of employees is arbitrary and irrational in the absence of a rational connection with the employer's conduct and investment expectations. As stated by Justice O'Connor in *Connolly*:

> . . . whatever promises a collectively bargained plan makes with respect to benefits may not always be rationally traceable to the employer's conduct and that it may sometimes be quite fictitious to speak of such plans as "promising" benefits at a specified level, since to do so ignores express and bargained-for conditions on those promises. Where the plan's fixed-contribution aspects were agreed to by employees through their exclusive bargaining representatives, and where employers had no control over the level of benefits promised, employer responsibility for the benefits specified by the plan is very much attenuated, and employee expectations that those benefits will in all events be paid, in the face of plain language to the contrary, are not easily traceable to the employer's conduct.

Id. at 235-36.

The MPPAA's design, as applied, can permanently appropriate an employer's assets for the use of the Government, because the statute ultimately guarantees retirement benefits through the insurance program administered by the Pension Benefit Guaranty Corporation ("PBGC"). The MPPAA's withdrawal liability provisions are specifically designed to insulate these governmental guarantees. Thus, shouldering withdrawing employers with the burden of those benefits, beyond any meaningful input or control of the employer, is indeed a "taking," as recognized by Justice O'Connor. *See Connolly*, 475 U.S. at 228.

Whether a statute goes so far as to constitute a "taking" is an entirely separate question from the legislative power to regulate an area. *See, e.g., Pennsylvania Coal*

Co. v. Mahon, 260 U.S. 393 (1922). Here, Congress' creation of a government-sponsored guaranteed benefits program and the application of the MPPAA, under the Petitioner's circumstances, and in other circumstances illustrated in the next section, effect a "taking" within the logic of *Pennsylvania Coal. Cf. Penn Central Transportation Co. v. New York*, 838 U.S. 104 (1978).[11]

C. A Trucking Industry Example Where There Is No Rational Relationship Between Contributions and Benefits.

The facts surrounding the Petition represent a single example where an employer's benefit liabilities are not rationally related to its contributions or investment-backed expectations, but the case is by no means an isolated example. We believe that the situations of many trucking industry employers who contribute to fixed-contribution multiemployer plans illustrate some of the problems with the MPPAA, as applied, which the *Connolly* concurrence recognizes.

MME, and other trucking employers who are members of the Coalition and NTTC, are signatories to various collectively-bargained agreements, such as the Teamsters National Master Freight Agreement ("NMFA"), which is negotiated by a multiemployer bargaining unit composed of large motor carriers that control the process. Under such agreements, most of these other employers contribute to a number of multiemployer pension plans, including the Central States Southeast and Southwest Areas Pension Fund ("Central States").[12] These truck-

[11] The three relevant factors identified in *Penn Central* of "particular significance" are: (1) "the economic impact of the regulation"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action." *Penn Central*, 838 U.S. at 124.

[12] Central States is the largest multiemployer pension plan under ERISA, as amended by the MPPAA. It receives contributions from employers in approximately 24 states in the central and southern

ing employers are required to make weekly contributions for their employees, with an expectation, specifically set forth in the 1974 Central States' Trust Agreement, that their liability was limited to their contributions.[13] The collective bargaining agreement under which these employers contribute to Central States does not set the types or levels of benefits to be provided their employees under the plan, nor does it govern benefit increases.[14]

Thus, to the extent that the provisions of MPPAA impose liability on contributing employers for unfunded benefits that accrued in the past, the imposition of withdrawal liability assessments is a retroactive liability. Additionally, the larger employers who historically dominate the collective bargaining process have an incentive to maximize the amount of withdrawal liability which other, generally smaller, employers would face in a with-

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United States. As pointed out, it is historically the largest underfunded plan in the United States.

[13] Central States has modified its trust agreement subsequent to enactment of ERISA and the MPPAA so that it does not contain the contractual limitation contained in the 1974 Trust Agreement. This change is not in itself controlling. It is the integrated effect of Congressional regulation under the Labor Management Relations (Taft-Hartley) Act of 1947, ERISA and the MPPAA, redefining the nature and elements of collectively-bargained multiemployer pension plans, which may constitute a "taking," as applied.

[14] Further, MME and many other employer members of the Coalition and NTTC are not members of the employer groups who designate the four employer trustees to Central States. Central States permits the Southern Motor Carriers Labor Relations Association, Inc. to name one employer trustee; the Cleveland Draymen Association, Inc., the Northern Ohio Motor Truck Association, Inc., and the Cartage Employers Management Association, collectively, to name one employer trustee; and the Motor Carriers Employers Conference—Central States to name two employer trustees to its Board of Trustees. *1991 Central States Trust Agreement*, Article Two, Section 2.

drawal from Central States, whether voluntary or involuntary.[15] Consequently, these generally smaller employers, who have little or no say over the contribution levels negotiated in collective bargaining agreements, also have never had a say over the levels and amounts of benefits that Central States sets or pays its retirees or their beneficiaries. This authority rests exclusively with Central States.

As the preceding facts show, there are no checks and balances present in the MPPAA governing benefit levels and benefit increases. The history of employer contributions received and benefits paid by Central States from 1975 to 1990 indicates that, following the enactment of the MPPAA, Central States began to "mortgage the future," borrowing against current employer contributions made on behalf of current workers to pay benefits to retirees.[16] An analysis of this history demonstrates a

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[15] See *supra* note 14 and accompanying text. An involuntary withdrawal, such as a disclaimer of interest, is egregious because it is the union which fundamentally controls the decision to disclaim interest in the covered employees. When the union acts to disclaim interest, it forces a withdrawal and withdrawal liability entirely outside of the control of an employer. In contrast, the purpose and rationale of applying the MPPAA retroactively is to minimize the incidence of purely *voluntary* withdrawals, consistent with the MPPAA. Arguably, therefore, application of the MPPAA in an involuntary withdrawal is *per se* unconstitutional under the Fifth Amendment. *Compare Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (1982), with Justice O'Connor's concurring opinion in *Connolly*. Significantly, in *Peick*, which upheld a district court *facial* constitutional Fifth Amendment challenge to the MPPAA, the court found that ". . . MPPAA thus protects the interlocking interests of the PBGC, its premium payers, the non-withdrawing employers and the vested employees. It does so at the expense of the withdrawn employers, *the parties whose conduct threatens the harm.*" *Id.* at 1046-47 (emphasis added).

[16] *See* Appendix A. Central States acknowledges that it has utilized employer contributions made on behalf of active workers to pay for retiree pension benefits.

> Fewer active participants in each Fund, and the resulting loss of employer contributions, made it increasingly difficult to provide benefits to retirees when those benefits were paid for in

marked reversal in the ratio of contributions to benefits. *See* Chart of the *Ratio of Contributions Received to Benefits Paid by Central States from 1975-1990*, prepared by the MPPAA Solvency Coalition and attached to this brief as Appendix A. During the five-year period from 1975 to 1980, the ratio of contributions to benefits rose from 142 percent to 180 percent. Following the enactment of MPPAA in 1980, the ratio plummeted from 180 percent in 1980 to 71 percent in 1990.

This drastic trend reversal proves that there is no rational relationship between employer contributions paid to Central States and the benefits paid to retirees. Over the 15 years under review (1975-1990), what arguably may have been a reasonable relationship has become highly distorted and totally irrational—a result not foreseen by the framers of the MPPAA.

As shown on Appendix A, contributions received by Central States rose between 1975 and 1980, while benefits paid by Central States increased slightly. In this period, the level of contributions negotiated and agreed to in the Central States supplements rose from $22.00 per participant per week in 1975, to $46.00 per participant per week in 1980. *See* Central States' Supplements to the NMFA. In this period, the total number of active participants remained relatively constant.[17] Clearly, Central States managed its benefits paid during this period on a reasonable basis.

In 1980, however, Central States sharply reversed this trend. Employer contributions received by Central States increased modestly from 1980 to 1990. In this period, the total number of active participants decreased sub-

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large part by contributions made on behalf of active participants.

Central States Southeast and Southwest Areas Health and Welfare and Pension Funds, 1989 Annual Report at 2.

[17] References to active partipant data are based upon the information reported by Central States in its Forms 5500 filed with the Department of Labor.

stantially, and the contribution base declined 36.4 percent. However, the drop in the number of active participants was partially offset by an increase in the level of contributions agreed to in the Central States Supplements to the NMFA, which rose from $46.00 per participant per week in 1980 to $73.00 per participant per week in 1990.

Nevertheless, in the face of only modest increases in contributions and a substantial decline in its contribution base, Central States tripled benefits payable. Specifically, Central States increased its benefits payable after 30 years of service at age 65 from $775 in 1983, to $1,000 in 1985, and again to $2,500 in 1991.[18] It also increased its benefits payable after 30 years of service at ages 57 and 60 from $1,000 in 1985 to $2,000 in 1991.[19] These increases in benefit levels have had a frightening negative effect on the ratio of contributions to benefits.

Not surprisingly, despite ten years of excellent investment opportunities[20] since the enactment of the MPPAA, Central States remains a seriously underfunded multiemployer pension plan.[21]

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[18] *Central States Special Bulletins* 82-3, 85-3 and 91-4.

[19] *Id.* 85-3 and 91-4.

[20] Central States' investments earned 16.5 percent on average over the period from 1984-1989. *Central States*, 1989 Annual Report at 2. In contrast, interest rate assumptions of between 6 and 8 percent for purposes of calculating employer withdrawal liability during the same period have been held reasonable. *See, e.g., Penn Textile, supra* note 11.

[21] Central States' unfunded vested benefit liability was nearly $1.7 billion at the end of 1990. *See* note 2 *supra*. Moreover, based upon the figures reported in its 1990 annual report, Central States' unfunded vested benefit liability is estimated to reach nearly $2.3 billion at the end of 1991. See *Estimated 1991 Unfunded Vested Benefits Liability of Central States Pension Fund*, prepared by the MPPAA Solvency Coalition and attached to this brief as Appendix B.

Conclusively, then, in these and other circumstances, there is no rational relationship between an employer's "proportionate share of withdrawal liability," which is based on its pro-rata share of unfunded vested benefits, and the employer's collectively bargained contributions or its reasonable expectations (where pre- or post-enactment of the MPPAA). As stated by Justice O'Connor in *Connolly* on the application of the MPPAA and ERISA:

> . . . [B]oth statutes impose liability under certain circumstances on contributing employers for unfunded benefits that accrued in the past under a pension plan, whether or not the employers had agreed to ensure that the benefits would be fully funded. In my view, imposition of this type of retroactive liability on employers, to be constitutional must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility.

475 U.S. at 228.

The MPPAA's rationale rests on the proposition that, to protect employee's retirement benefits from the adverse consequences of the *conduct of employers* (i.e., from premature voluntary withdrawals from a plan), it is fair to require withdrawing employers to pay their proportionate share of the liability attributable to the plan's unfunded vested benefits. This rationale fails as applied to Petitioner's case and others such as those described by *amici*.[22]

Withdrawal liability is unconstitutional under the Due Process and Taking Clauses of the Fifth Amendment to the extent that it is attributable to: (1) past unfunded vested benefits for which an employer did not ensure full

[22] In Petitioner's case, a *unilateral* benefit increase by CLPT arbitrarily increased the unfunded vested liability of the fund and, in turn, the withdrawal liability assessed against the Petitioner. Pet. at 3 and 17-18.

funding; (2) contribution or benefit levels over which an employer has no effective control to ensure full funding; or (3) benefit increases over which an employer has no effective control to ensure full funding.[23] It is arbitrary and irrational to impose withdrawal liability on an employer, such as the Petitioner, and similarly situated employers, beyond an amount that is *rationally related* to the employer's contributions and its reasonable investment-backed expectations. *See Connolly*, 475 U.S. at 236.

[23] At a minmum, we propose that the imposition of withdrawal liability is an unconstitutional taking where a plan:

(1) is chronically underfunded;

(2) has a declining contribution base;

(3) has a declining ratio of active participants to retirees; and

(4) increases benefits that increase its unfunded vested benefit liabilities, outside of the employer's control.

This test adopts the marketplace principle that the asset owners must be risk bearers. *See* Love, *ERISA: The Law Versus Economics*, 26 Ga. L. Rev. 135 (1990). Because this inherent principle is absent under the MPPAA scheme, this Court must ensure that the arbitrary and irrational application of the MPPAA does not continue to spell the demise of the multiemployer pension plan system.

CONCLUSION

Based upon the foregoing, *amici* submit that the decision of the U.S. Court of Appeals for the Ninth Circuit in *Concrete Pipe* is incorrect, and should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

RATIO OF CONTRIBUTIONS RECEIVED TO BENEFITS PAID BY THE CENTRAL STATES SOUTHWEST AND SOUTHWEST AREAS PENSION FUND
(1975-1990)

Year *	Contributions Received *	Benefits Paid *	Ratio of Contributions to Benefits
1975	303,611,182	213,862,619	142%
1976	321,812,279	224,517,997	143%
1977	418,718,816	275,541,517	152%
1978	497,148,816	303,052,015	164%
1979	606,565,963	349,455,227	174%
1980	651,926,394	361,538,026	180%
1981	676,233,915	417,088,945	162%
1982	651,024,438	500,486,964	130%
1983	637,591,391	541,940,716	118%
1984	648,550,553	637,860,242	102%
1985	650,494,028	687,997,034	95%
1987	716,772,679	833,882,006	86%
1988	746,411,768	897,727,258	83%
1990	726,537,317	1,028,410,612	71%

(* Source: Central States Forms 5500 filed with the U.S. Department of Labor for the years 1975-1990.)

APPENDIX B

ESTIMATED 1991
UNFUNDED VESTED BENEFITS LIABILITY
OF CENTRAL STATES PENSION FUND

1990 Annual Report	
Net Assets:	$ 9,934,985,000 *
Less Vested Benefits:	$12,209,000,000 *
Estimated 1991 UVBL:	$ 2,274,015,000
Actual 1990 UVBL:	$ 1,715,215,000
One Year Estimated Increase:	$ 558,800,000

(* Source: Central States, Southeast and Southwest Areas Pension Fund 1990 Annual Report)

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

No. 91-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST
FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST
FOR SOUTHERN CALIFORNIA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Trucking Associations, Inc. ("ATA") is the national trade association of the trucking industry, which includes more than 31,000 carriers regulated in interstate commerce. Many of these firms contribute to multiemployer pension plans and are thus subject to withdrawal liability under the Multi-

employer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, as amended, 29 U.S.C. §§ 1381-1461. MPPAA makes an employer that withdraws from a multiemployer plan liable for an allocable share of the plan's unfunded vested benefit liability, even if the employer has complied with all of its obligations under the collective bargaining agreement.

This novel statutory liability has had a serious impact on the trucking industry. A significant number of the largest plans that ATA members contribute to are underfunded. A single large Teamsters plan, the Central States Southeast and Southwest Areas Fund, had an unfunded vested benefit liability of nearly $1.7 billion at the end of 1990.[1] According to a 1984 report of the Comptroller General, in just the first few years of MPPAA, five plans with substantial trucking industry participation had assessed withdrawal liability of $24.8 million against 88 employers, an average of more than $280,000 per employer.[2]

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[1] *Central States Southeast and Southwest Areas Health & Welfare Funds: 1990 Annual Report* at 5.

[2] *Report to the Congress: Assessment of Special Rules Exempting Employers Withdrawing From Multiemployer Pension Plans From Withdrawal Liability* 25 (GAO/HRD-84-1 May 14, 1984). Although MPPAA contains special provisions intended to ameliorate the withdrawal liability of employers in the trucking industry, 29 U.S.C. § 1383(d), the requirement that "substantially all" of the plan's contributions come from trucking industry employers has meant that hardly any plans qualify for the special treatment. *Id.* at 24-25; *Continental Can Co., Inc. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund*, 916 F.2d 1154 (7th Cir. 1990).

The trucking industry has been particularly hard-hit by withdrawal liability because of the Motor Carrier Act of 1980 ("MCA"), 94 Stat. 793. That Act substantially deregulated the trucking industry and has caused a significant increase in both nonunion and union competition. It thus has forced a major restructuring of the unionized portion of the industry. Yet, MPPAA, enacted only 87 days after MCA, penalizes the very actions—motor carrier acquisitions, reorganizations, and dissolutions—necessary for such an industry-wide restructuring.

ATA believes that, at minimum, the Due Process Clause of the Fifth Amendment gives withdrawing employers the right to a determination of their potentially ruinous MPPAA liability by a neutral and detached decisionmaker, a right the MPPAA scheme denies them. ATA therefore files this brief urging reversal of the judgment of the Court of Appeals.[3]

SUMMARY OF ARGUMENT

Through MPPAA, Congress gave multiemployer pension plans a wholly new private right against employers withdrawing from such plans. Specifically, Congress made a withdrawing employer liable to the plan for its allocable share of the plan's unfunded vested benefits. 29 U.S.C. § 1381(b). The procedures established by Congress for the vindication of this private right to monetary compensation are extraordinary. The pension plan itself, through its trustees, decides whether a withdrawing employer is liable to

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[3] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of the Court.

the plan under MPPAA, and assesses the amount of that liability. *Id.* § 1382.

In making that determination, the trustees owe a strict fiduciary duty to the plan, *id.* § 1002(21)(A), and can be held personally liable for breaching that duty. *Id.* §§ 1109, 1132. The statute thus predisposes the trustees to maximize the employer's withdrawal liability as a way of maximizing the plan's assets.

To challenge the trustees' inherently biased findings, the employer is relegated to an arbitration proceeding in which those findings are "*presumed correct* unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." *Id.* § 1401(a)(3)(A) (emphasis added).

MPPAA thus places extraordinary decisionmaking power in the hands of the very private party that stands to benefit; it presumes the correctness of the necessarily biased liability determinations of that party's trustees; and it insulates those tainted determinations from a searching, *de novo* review by a disinterested decisionmaker. A withdrawing employer is thus denied a fair, impartial, and objective assessment of its liability. The scheme provides neither "a neutral and detached judge in the first instance," *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972), nor *de novo* review by an impartial and disinterested tribunal, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980). MPPAA thus violates the Due Process Clause.

ARGUMENT

I. THE TRUSTEES OF THE PLAN ARE NOT "NEUTRAL AND DETACHED" DECISIONMAKERS.

Because an assessment and collection of withdrawal liability deprives an employer of property, the employer is entitled to due process. Due process requires at a minimum an impartial decisionmaker: "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule." *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). In determining whether a decisionmaker is biased, there initially is a presumption of impartiality. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). The presumption, however, "can be rebuttted by a showing of conflict of interest or some other specific reason for disqualification." *Id.*

To rebut the presumption, it need only be shown that the decisionmaker is *potentially* subject to such disqualifying interests, not that the decisionmaker was *actually* biased.[4] "Not only is a biased decisionmaker constitutionally unacceptable, but 'our system has always endeavored to prevent even the probability of unfairness.'" *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. at 136). This requires a "realistic appraisal of psychological tendencies and human weaknesses." *Id.*

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[4] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (Court not required to decide whether decisionmaker "in fact . . . was influenced" by possible temptation to bias); *In re Murchison*, 349 U.S. 133, 136 (1955) (no need to show "actual bias"); *Tumey v. Ohio*, 273 U.S. at 532 (Due Process Clause prohibits any "procedure which would offer a possible temptation to the average man . . . or which might lead him not to hold the balance nice, clean and true . . . .").

This Court has identified a number of disqualifying influences: direct pecuniary interest of the decisionmaker in the outcome, *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Tumey v. Ohio*, 273 U.S. at 523; a combination of statutory duties with the quasi-judicial function which creates a "possible temptation" for the decisionmaker to render his decision for partisan reasons, *see Ward v. Village of Monroeville*, 409 U.S. at 60; or the decisionmaker's prior involvement in the matter under consideration, *Schweiker v. McClure*, 456 U.S. at 192; *Offutt v. United States*, 348 U.S. 11 (1954). Plan trustees under the MPPAA scheme are subject to all of these disqualifying influences.

A. The Plan Trustees' Assessment of Withdrawal Liability Is Tainted By The Plan's Manifest Pecuniary Interest in the Outcome.

This Court has stated that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. at 136. Under the MPPAA scheme, however, the plan, through its trustees, is permitted to do exactly that.

This Court has held decisionmakers to be impermissibly biased where their pecuniary interest is far more attenuated than the multiemployer pension plan's interest in receiving withdrawal liability payments. In *Gibson v. Berryhill*, *supra*, this Court affirmed the finding of a three-judge district court that the Alabama Board of Optometry, a body composed of optometrists in private practice, could not hear a license revocation proceeding against other optometrists because, if the licenses were revoked, "the individual members of the Board, along with other private practitioners of optometry, would fall heir to this business."

411 U.S. at 571. Obviously, the ability of Board members to capitalize on the revocation of other practitioners' licenses was contingent on numerous intervening events.

In the present case, the pecuniary gain to the plan assessing an employer's withdrawal liability is immediate, substantial and contingent only on the liquidity of the employer. *A fortiori*, the plan's pecuniary interest renders it impermissibly biased.

Although Congress may, consistent with due process, delegate adjudicative functions to a private party, in MPPAA Congress impermissibly placed those functions in the hands of a private party which stands to benefit from the assessment of withdrawal liability and which is not employed by the government—the multiemployer pension plan itself. Thus, the instant case is quite unlike *Schweiker v. McClure*, 456 U.S. 188 (1982), where the Court upheld a congressional delegation of adjudicative functions to private insurance carriers because the Medicare plans being adjudicated were paid entirely out of government funds, and because the carriers were employed and compensated by the government pursuant to contracts requiring them to adhere to detailed regulations. Here, in contrast, the party to which adjudicative power is delegated will pocket the amounts assessed, and it cannot be "fired" by the government for overreaching.

B. The Plan Trustees Are Biased Decisionmakers By Virtue of Their Statutory Role as Fiduciaries of the Plan.

"All of the trustees, including those selected by employers, are fiduciaries of the fund, 29 U.S.C. § 1002 (21) (A), and thus owe an exclusive duty to the fund."

Yahn & McDonnell, 787 F.2d 128, 138-39 (3d Cir. 1986), *aff'd by an equally divided Court*, 481 U.S. 735 (1987).

> Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

NLRB v. Amax Coal Co., 453 U.S. 322, 329-30 (1981). Trustees are personally liable to the fund for breach of these "strict fiduciary obligations." 29 U.S.C. §§ 1109, 1132; *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 139-143 (1985).

This legal framework ensures that trustees exercise every effort to maximize the assets available to a pension plan. The legislative history demonstrates that Congress expected pension plans, in enforcing the withdrawal liability provisions, to act as ordinary litigants concerned with "maximizing the total ultimate recovery":

> We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristics of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs.[5]

[5] 126 Cong. Rec. 29,255 (1980) (statement of Senator Williams, MPPAA co-sponsor).

Congress thus contemplated that plan trustees, as an inherent consequence of their fiduciary duties, would act to maximize withdrawal liability. Individuals with such statutory duties cannot be presumed impartial in quasi-judicial decisions. *See Schweiker v. McClure*, 456 U.S. at 195.

While Congress did state that failure to maximize withdrawal liability is not a *per se* violation of fiduciary duty,[6] the very fact that it can be a violation at all renders the trustees' decision something other than "neutral and detached." This Court has concluded that fear of lawsuit can improperly interfere with judicial decisionmaking. *Stump v. Sparkman*, 435 U.S. 349, 363-64 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). By the same token, a private party that is subject to lawsuit for his decisions cannot be expected to act without considering the personal consequences. In addition, since plan trustees are, when assessing withdrawal liability, often dealing with the consequences of their prior decisions that resulted in underfunding, their prior involvement in the matters at issue is further reason to doubt their objectivity.[7]

[6] H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 67, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2935.

[7] *Cf. Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972) (due process requires that supervising parole officer not determine whether reasonable grounds exist for revocation of parole; "realistically the failure of the parolee is in a sense a failure for his supervising officer."). As in *Morrissey*, this "is not an issue limited to bad motivation," 408 U.S. at 486 n.14, but rather simply a "realistic appraisal of psychological tendencies and human weakness." *Withrow v. Larkin*, 421 U.S. at 47.

It is not sufficient to argue, as some have, that reducing withdrawal liability to encourage future employer participation in the plan might also be consistent with the trustees' fiduciary duty. *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1142-43 (1st Cir. 1985) (en banc). A risk-averse trustee would certainly be more concerned with being "second-guessed"—by way of a lawsuit for breach of fiduciary duty—for letting a withdrawing employer get away cheap than for discouraging some hypothetical future employer from entering the plan. The speculation that "manifest bias will not always result in gross injustice to employers" does not save the statutory scheme:

> It seems an odd principle to determine the permissibility of manifest bias by weighing the decisionmaker's conflicting interests in the scale of justice and finding which side predominates.[8]

The possibility that some inherently biased persons vested with decisionmaking authority will demonstrate fairness and statesmanship, and will show great foresight, is not sufficient. The procedure must be judged by whether it might lead "the *average* man . . . not to hold the balance nice, clean and true . . . ." *Tumey v. Ohio*, 273 U.S. at 532 (emphasis added). Under this standard, the MPPAA scheme clearly violates the Due Process Clause.

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[8] *Keith Fulton & Sons, Inc. v. New England Teamsters Pension Fund, Inc.*, 762 F.2d 1137, 1149-50 (1st Cir. 1985) (en banc) (Aldrich, J., dissenting).

II. UNDER THE STATUTORY SCHEME, THE EMPLOYER AT NO POINT RECEIVES *DE NOVO* ADJUDICATION OF ITS WITHDRAWAL LIABILITY ASSESSMENT.

Due process requires that a citizen have the right to a trial *de novo* before a neutral and detached decisionmaker. *Ward v. Village of Monroeville*, 409 U.S. at 60-61; *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43, 245 (1980). *Ward* held that due process requires a neutral and detached judge in the first instance, and even *de novo* review will not cure the failure to provide one. 409 U.S. at 61-62. *Marshall v. Jerrico* held that where the initial determination of liability was made by a party with enforcement rather than judicial responsibilities, trial *de novo* "of all factual and legal issues" preserved the statutory scheme. 446 U.S. at 245 (emphasis added); *see also Withrow v. Larkin*, 421 U.S. 35, 58 (1975) ("substantial due process question would be raised" if "nonadversarial processes . . . foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision").

MPPAA's presumption of correctness completes the deprivation of due process by shielding the initial determination, which is made by an interested decisionmaker, from *de novo review*. At no point does an employer receive the trial *de novo* before an impartial decisionmaker guaranteed by the Constitution. In an arbitration, the employer's proof must do more than show that the plan's determination was erroneous or less reasonable than the employer's position; the employer must prove that the determination was "unreasonable or clearly erroneous." 29 U.S.C. § 1401 (a)(3). Thus, even if the arbitrator were to find by a preponderance of the evidence that the plan's determi-

nation was *merely* erroneous, but not *clearly* erroneous, the arbitrator would be bound to defer to the plan. In this complicated and unsettled area, such clarity of error will seldom be apparent.[9] Even if the arbitrator found *some* of the actuarial assumptions unreasonable, and that they were applied erroneously, the arbitrator would be bound to uphold the determination of the unfunded vested benefits if the assumptions were not unreasonable *in the aggregate* and there was no *significant* error in their application.[10]

The virtually dispositive force of the presumption can be seen in arbitrations where it is invoked in almost talismaniac fashion to avoid searching consideration of disputed questions of fact.[11] That arbi-

[9] *See, e.g., Trustees of the Pressman Local 72 Industry Pension Fund v. Judd & Detweiler, Inc.*, 736 F. Supp. 1351 (D. Md. 1988), wherein the district court vacated an arbitrator's decision rejecting the plan's interest rate assumption because it "merely substituted his own judgment for that of the trustees," despite the fact that the arbitrator acknowledged the presumption in favor of the plan's determination and made specific findings that the plan's determination was unreasonable.

[10] *Cf. Combs v. Classic Coal Corp.*, 931 F.2d 96 (D.C. Cir. 1991) (arbitrator's decision in favor of employer set aside even though his finding that plan's interest rate assumption was unreasonable was well supported).

[11] *See, e.g., Coal Drilling Services, Inc. & UMW 1974 Pension Plan*, 5 Employee Benefits Cas. (BNA) 1833, 1835 (Arb. 1984); *UMW 1974 Pension Plan & Williamson Shaft Contracting Co.*, 6 Employee Benefits Cas. (BNA) 1593, 1604 (Arb. 1985); *Hertz Corp. v. Commission Salesmen, Drivers & Helpers Local 187 Pension Fund*, 4 Employee Benefits Cas. (BNA) 1367, 1380-81 (Arb. 1983); *Palmer Coking Coal Co. & UMW 1950 & 1974 Pension Plans*, 5 Employee Benefits Cas. (BNA) 2369, 2383 & n.6 (Arb. 1984). In *Hertz*, the arbitrator resolved the disputed issue on the basis of the presumption even though the company's position had "a certain undeniable plausibility." 4 Employee Benefits Cas. (BNA) at 1381. The arbitrator in *Palmer Coking* described the presumption as imposing "rigorous standards of arbitral review." *Palmer Coking*, 5 Employee Benefits Cas. (BNA) at 2383 & n.6.

trators have in some instances revised plan determinations does not prove that the system is fair, only that the unfairness does not *guarantee* a result adverse to the employer in *every* case. Presumably the Mayor of Monroeville did not impose a fine in every case that came before him. One challenging a procedure as violative of Due Process does not have the burden of showing "special prejudice in [the] particular case." Such a burden "requires too much and protects too little." *Ward v. Village of Monroeville*, 409 U.S. at 61. The challenger need only show a systemic deprivation of a fair, *de novo* hearing. *Cf. In re Murchison*, 349 U.S. at 136 ("[O]ur system of law has always endeavored to prevent even the probability of unfairness.").

Presumptions created by civil statutes must exhibit "'some rational connection between the fact proved and the ultimate fact presumed, and . . . the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'" *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (quoting *Mobile, J. & K.C.R.R. v. Turnipseed*, 219 U.S. 34, 43 (1910)). Here, the presumption infers the correctness of a given determination of withdrawal liability simply from the fact that the determination was made by the plan. One would be hard pressed to invent a plausible reason why the determination of an obligation should be presumed correct when the determining has been done unilaterally by the obligee. The legislative history makes it

clear that Congress had no empirical or logical justification for the statutory presumption; rather, Congress simply wanted to favor plans over employers and expedite proceedings in an area where there is a wide divergence of viewpoints.[12] Absent some better justification than mere expediency, the presumption violates due process.

III. THE ACT GIVES THE PLAN AND ITS TRUSTEES FULL POWER TO EFFECTUATE THEIR BIAS.

The foregoing discussion has shown that a plan, through its trustees, cannot be unbiased for purposes of performing a quasi-judicial decisionmaking role. It has been argued that, nonetheless, the trustees have no ability to put their bias into effect because the calculation of withdrawal liability is essentially ministerial. *See, e.g., Yahn & McDonnell*, 787 F.2d at 145 (Seitz, J., dissenting). An examination of a plan's powers under the Act demonstrates the contrary. The plan trustees have wide latitude to effectuate their bias in determining both the existence and the amount of withdrawal liability, especially through the determination of the expected rate of return on assets.

A. The Issue Whether MPPAA Applies At All Is A Fact-Sensitive, Case-By-Case Determination Made By The Plan.

The numerical calculation of withdrawal liability is only a small part of the plan's determinations. The presumption of correctness that was declared unconstitutional by the court of appeals in *Yahn* applies to

[12] *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis*, 98th Cong., 2d Sess. 21 (1980); H.R. Rep. No. 869, pt. I, 98th Cong., 2d Sess. 1, 86 *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2954.

"any determination . . . under sections 1381 through 1399 of this title and section 1405." 29 U.S.C. § 1401(a)(3)(A). In the present case the single most difficult issue, decided in the first instance by the plan trustees, is *when* the withdrawal occurred, *i.e.*, when the employer had "permanently cease[d]" having an obligation to contribute or "permanently cease[d] all covered operations." *Id.* § 1383(a). Among the other factual matters determinable under these sections are:

- Whether an employer had "an obligation to contribute" to a plan. *Id.* §§ 1383(a), 1392. *See ILGWU National Fund v. Levy Brothers Frocks*, 846 F.2d 879 (2d Cir. 1988).
- Whether a sale of assets is protected from the imposition of withdrawal liability. *Id.* § 1384. *See Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405 (7th Cir. 1989).
- Whether the "principal purpose of any transaction is to evade or avoid liability" and therefore should be disregarded. *Id.* § 1392(c). *See Banner Industries v. Central States Pension Fund*, 875 F.2d 1285 (7th Cir. 1989).
- Whether a change in business form is to be considered a withdrawal. *Id.* § 1398(1). *See Connors v. B&W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986).
- Whether an employer's cessation of contributions during a labor dispute constituted a complete withdrawal or was within the statute's "labor dispute" exception. *Id.* § 1398(2). *See Combs v. Adkins & Adkins Coal Co.*, 597 F. Supp. 122 (D.D.C. 1984).

That the presumption applies to factual determinations, rather than legal determinations, only begs the question. A plan has tremendous discretion in individual cases to determine that an exception or provision does or does not apply. This individualized, case-specific decision can eliminate withdrawal liability altogether or impose liability without a proper basis. Withdrawal liability in its simplest terms is a statutorily created debt running from one private party to another; adjudication of such private rights is the quintessential function of the judiciary. *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 591 (1985) (adjudication which subjects unwilling defendant to judicial enforcement encroaches upon judicial powers). The requirement that the decision-maker be neutral and detached therefore applies.

B. The Calculation of Withdrawal Liability Is Not a Ministerial Act, But Rather Has Discretionary Elements That Give a Plan Broad Leeway to Maximize Liability.

The statute permits a plan broad discretion in the assumptions and data employed in the calculation of withdrawal liability, and the calculation is, thus, far from ministerial. A plan may use any actuarial assumptions and methods, so long as they "in the aggregate, are reasonable." 29 U.S.C. § 1393(a)(1). The Pension Benefit Guaranty Corporation ("PBGC") cannot require a plan to use any particular assumptions or methods. *Id.* § 1393(a). A plan need not obtain complete data, but rather may "rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan." *Id.* § 1393(b)(2). These

provisions permit wide variation among plans in the actuarial determinations. As set forth below, such determinations involve as much "art" as "science."

The General Accounting Office's ("GAO") *Report to the Congress: Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* (GAO/HRD-85-16, Mar. 14, 1985) confirms the extent of potential actuarial variation. The Report notes that assumptions can vary significantly among actuaries, yet "[n]otwithstanding the variables inherent in the determination of a plan's withdrawal liability, MPPAA provides that a plan's determination is presumed correct in disputes resulting in arbitration unless the employer can show that it is unreasonable or in error." *Id.* at 24. The GAO Report concludes:

> Notwithstanding the appropriateness of different actuarial assumptions for different plans, the calculations of a plan's unfunded actuarial liability involves considerable judgment by the actuary concerning future uncertainties. Because of such uncertainties, the actuary's estimates of future returns on a plan's investments could result in determinations of liabilities that could be inequitable to the withdrawing employers.[13]

Actuaries themselves confirm the complexity of the withdrawal liability calculation and the potential variation in liability based on the assumption used. The senior actuarial adviser on the policy and planning staff of the PBGC has noted "unanswered questions," "potential sources of controversy," and "theoretical

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[13] *Id.* at 33 (emphasis added).

incongruities" in the calculation of withdrawal liability.[14]

Perhaps the most important actuarial assumption is the interest rate assumed for calculating the future return on plan investments. Assuming a lower rate of return on assets will increase the amount of assets needed to achieve actuarial goals. A plan's unfunded vested benefits can vary dramatically according to the rate used. As an actuarial rule of thumb, the cost of funding benefits increases by 24% for each 1% decrease in the interest rate assumption.[15] *See Judd & Detweiler, supra*, 736 F. Supp. at 1353 (use of 6% interest rate instead of 6.5% increased employer's withdrawal liability from zero to $132,775). The actuary's valuation of plan assets, another area where there is a wide divergence of respectable views, may also have a significant impact on an employer's withdrawal liability.[16]

"The actuary's role under MPPAA is a difficult and precarious one." Brennan, *Multiemployer Plan Withdrawal Liability: An Actuary's View*, Pension World 41, 44 (Oct. 1982). Far from being a purely ministerial task, the actuary's determination involves sensitive and complicated questions of tradeoffs, "not

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[14] Amoroso, *Withdrawal Liability*, Employee Benefits J. 2, 4, 26 (June 1982).

[15] *Pension Plan Underfunding: Hearing Before the Subcommittee on Oversight and the Subcommittee on Social Security of the House Committee on Ways and Means*, 99th Cong., 2d Sess. 13 (June 24, 1986).

[16] *See Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727 (4th Cir. 1990); *Huber v. Casablanca Industries Inc.*, 916 F.2d 85, 93 (3d Cir. 1990).

exclusively in the technician's domain."[17] Because the actuary is retained by the plan, any discretionary matters will usually be resolved in the plan's favor. If not, the plan is free to change actuaries or to employ its own actuarial assumptions.[18]

Plans are free to shop for the actuaries whose "philosophy" best fits their own and to make decisions on the major elements of the liability calculation. But the employer is never permitted effectively to challenge any of these choices before a neutral and detached decisionmaker.

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[17] Amoroso, *supra*, at 6.

[18] This reality is starkly illustrated in *Huber v. Casablanca Industries Inc.*, 916 F.2d 85, 93 (3d Cir. 1990), where the plan's actuary, Mr. Halliwell, initially valued the assets of the plan at $14 million. The minutes of the next trustees' meeting state:

> The Board expressed its concern over Mr. Halliwell's method of calculating withdrawal liability . . . The Board expressed lack of confidence in the calculation and Mr. Halliwell's advice. The Board agreed that it should consider other actuaries at the next Board of Trustees meeting, to provide services to the Fund including a final calculating of withdrawal liability in accordance with the statute.

"Within a few days," the Third Circuit noted, "both Halliwell's advice and the Board's opinion of him had changed." During the intervening time, Halliwell had substantially reduced his valuation of the plan's assets, and thereby increased the withdrawal liability.

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit. Because the presumption of correctness of pension plan trustees' determinations, 29 U.S.C. § 1401(a)(3), is severable from the remainder of MPPAA, *Yahn & McDonnell*, 787 F.2d at 144, the case should be remanded for arbitration with no presumption in favor of the trustee's determinations.

Respectfully submitted,

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July 10, 1992

Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

No. 91-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST
FOR SOUTHERN CALIFORNIA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF THE PENSION BENEFIT GUARANTY CORPORATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Amicus curiae the Pension Benefit Guaranty Corporation ("PBGC")[1] is the federal agency charged by Congress with the responsibility for administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1301-1461 (1988), including the provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208, at issue here.[1] PBGC insures the payment of certain pension benefits to participants in, *inter alia*, insolvent multiemployer pension plans. 29 U.S.C. §§ 1361, 1431. Among the PBGC's purposes is "encourag[ing] the continuation and maintenance of voluntary private pension plans for the benefit of their participants." 29 U.S.C. § 1302(a)(1).

This case involves constitutional challenges to provisions in MPPAA that are intended both to protect PBGC's multiemployer pension plan insurance program and to bolster the statutory objective of encouraging the continuation and maintenance of multiemployer pension plans. PBGC therefore has a vital interest in its outcome.

STATEMENT

A. *Congress's Response to a Faltering Multiemployer Plan Program.*

The background and legislative history of both ERISA and MPPAA are set forth in detail in *Connolly v. PBGC*, 475 U.S. 211 (1986), and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). *See also Nachman Corp. v. PBGC*, 446 U.S. 359 (1980). We summarize here only those portions of that description relevant to the issues before the Court.

Congress enacted ERISA in 1974 to "guarantee that 'if a worker has been promised a defined pension benefit upon

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[1] The PBGC is a wholly-owned federal government corporation whose Board of Directors is composed of the Secretaries of Labor, Commerce, and Treasury. The PBGC, which has independent litigating authority, 29 U.S.C. § 1302(b)(1), appears in this Court through its own counsel.

retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'" *Gray*, 467 U.S. at 720 (quoting *Nachman*, 446 U.S. at 375). To that end, Congress established in ERISA a comprehensive scheme for the regulation of private pension plans, including a pension plan termination insurance program to be administered and enforced by PBGC. 29 U.S.C. § 1302(a).

PBGC's insurance program, which covers both single-employer and multiemployer pension plans, was to be financed with premiums collected from all covered plans. 29 U.S.C. § 1306 (1976). When an insured single-employer plan terminated with insufficient assets to pay promised benefits, PBGC was obligated to pay participants certain basic benefits, 29 U.S.C. §§ 1361, 1381 (1976), and to collect any shortfall in the plan's assets from the employer, up to 30 percent of the employer's net worth. 29 U.S.C. § 1362(b) (1976). Congress delayed the mandatory guarantee of benefits in terminating multiemployer plans until 1978, however, and instead gave PBGC discretion whether to guarantee benefits upon plan termination. 29 U.S.C. § 1381(c)(2)-(4) (1976). When a multiemployer plan terminated, all employers that had contributed to the plan during the five years before its termination were liable to the PBGC for the shortfall in amounts proportional to their share of the plan's contributions during that period, subject to the 30 percent of net worth limitation. 29 U.S.C. § 1364 (1976).

In 1978, Congress further postponed a mandatory guarantee because the threat of multiemployer plan terminations posed an unacceptable risk to the insurance system. *Gray*, 467 U.S. at 720-22.[2] Indeed, ERISA's

[2] A 1978 PBGC report estimated that about ten percent of all multiemployer plans, covering 1.3 million participants, could terminate before 1988, costing the insurance system about 4.8 billion dollars, and requiring unacceptable premium increases. Pension Benefit Guaranty Corporation, ***Multiemployer Study Required by***

enactment may have exacerbated the problem by encouraging employers to withdraw from weak multiemployer plans. *Connolly*, 475 U.S. at 215-16; *Gray*, 467 U.S. at 722-24. The absence of immediate liability upon withdrawal permitted an employer to "withdraw from a plan leaving unfunded benefit obligations for his employees which must be paid by the remaining employers in the plan," and encouraged a "'last man out' mentality, with employers withdrawing from plans to avoid possible plan termination liability." 126 Cong. Rec. S10,100 (daily ed. July 29, 1980) (statement of Sen. Javits).

Accordingly, after several years of legislative and executive branch study, and after considering numerous alternatives, Congress enacted MPPAA. *Gray*, 467 U.S. at 723-25, 732. Under MPPAA, if an employer withdraws from a multiemployer plan, it incurs "withdrawal liability" to the plan. Withdrawal liability protects the financial stability of multiemployer plans and the retirement income of millions of participants by requiring withdrawing employers to continue funding their share of the plans' liabilities. Withdrawal liability, which is "a prophylactic extension of the liability initially imposed by ERISA," *Connolly*, 475 U.S. at 231 (O'Connor, J., concurring), is a "fixed and certain debt to the pension plan" that is "the employer's proportionate share of the plan's 'unfunded vested benefits.'" *Connolly*, 475 U.S. at 217 (quoting *Gray*, 467 U.S. at 725). By requiring a withdrawing employer to pay its fair "share of the plan obligations," *Connolly*, 475 U.S. at 225, Congress ensured that those obligations did not fall on the remaining employers and discourage new employers from joining the plans. *Gray*, 467 U.S. at 721-23. Withdrawal liability was thus the cornerstone of Congress's efforts to protect plan participants against benefit losses.

P.L. 95-214 138-39 (1978); *see* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 56-57 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2924.

B. *The Special Nature of Multiemployer Pension Plans.*

Congress's solution to the problem of underfunded multiemployer pension plans reflected the special nature of these plans. Multiemployer plans, by definition, are pension plans to which more than one employer is required to contribute, and are maintained pursuant to collective bargaining agreements. 29 U.S.C. § 1301(a)(3) (1988). *See also* 29 U.S.C. § 1002(37). Where a union participates in plan management, the plan must be jointly administered by representatives of labor and management under section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5).

Pension plans are either "defined contribution plans" or "defined benefit plans"; respondent is a defined benefit pension plan.[3] Because participants in a defined benefit plan receive a benefit only if they "vest," some participants in defined benefit plans never receive benefits. *See, e.g., Central States, S.E. and S.W. Areas Pension Fund v. Gerber Truck Serv.*, 870 F.2d 1148, 1154 (7th Cir. 1989) (en banc).[4] The benefits payable from a defined

[3] A defined contribution plan provides for contributions to an individual account for each participant and pays benefits based solely upon the value of the participant's account. 29 U.S.C. § 1002(34). The funding provisions of ERISA generally do not apply to such plans, 29 U.S.C. § 1081(a)(8), and such plans are not insured, 29 U.S.C. § 1321(b)(1). *See Connolly v. PBGC*, 581 F.2d 729, 733 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979). By contrast, a defined benefit plan, which is any plan that does *not* provide benefits based upon the value of the participant's account, 29 U.S.C. § 1002(35), promises a participant a fixed and definite benefit. *See Nachman*, 446 U.S. at 363 n.5. Most multiemployer pension plans are defined benefit plans.

[4] Benefits in a plan vest after a participant completes a specified period of service, 29 U.S.C. § 1053; thus, a plan's "vested benefits" include amounts payable in the future to participants who have not yet retired, as well as amounts currently being paid to retirees or their beneficiaries.

benefit plan depend on a formula that takes into account factors such as age, years of service, and salary.

The contributions made by employers participating in a multiemployer pension plan are pooled in a general fund and are based upon actuarial assumptions designed to assure that enough assets will be available to pay all benefits when due.[5] The pooled contributions of all employers are available to satisfy any benefit obligation under the plan. *See Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 469 (1960) (pre-ERISA law); *British Motor Car Distribs. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371, 378 (9th Cir. 1989); *Gerber Truck*, 870 F.2d at 1154; *O'Hare v. General Marine Transp. Corp.*, 740 F.2d 160, 173 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985); *Local Union 5 Sheet Metal Workers' Int'l*

[5] The pooling of contributions enables employers to share the cost of providing pensions to their employees, reduce administrative costs, and increase investment options. *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 582 F. Supp. 301, 303-04 (D.D.C. 1983), *aff'd*, 729 F.2d 1502 (D.C. Cir. 1984). These features are particularly beneficial in industries where

> there was little if any likelihood that individual employers would or could establish single-employer plans for their employees . . . , where there are hundreds and perhaps thousands of small employers, with countless numbers of employers going in and out of business each year, [and where] the nexus of employment has focused on the relationship of the workers to the union to which they belong, and/or the industry in which they are employed, rather than to any particular employer.

Multiemployer Pension Plan Termination Insurance Program: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 50 (1979) (statement of Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans). Such plans provide access to a trained labor supply that can move from employer to employer and project to project without a loss of service credit. *Washington Star*, 582 F. Supp. at 304; *see also* 29 U.S.C. §§ 1053(b)(1), 1060(a); 29 C.F.R. § 2530.210(c)(1) (1991) (portability of service credit mandatory).

Union v. Mahoning and Trumbull County Bldg. Trades Welfare Fund, 541 F.2d 636, 639 (6th Cir. 1976); *Hurd v. Hutnik*, 419 F. Supp. 630, 644 (D.N.J. 1976) (pre-ERISA law). Thus, for purposes of determining whether a multiemployer plan is for the "exclusive benefit" of an employer's employees and beneficiaries, *see* 26 U.S.C. § 401(a); 29 U.S.C. § 186(c)(5), all of the participants in the plan are considered to be the employees of each employer participating in the plan. 26 U.S.C. § 413(c)(2).

Under the Internal Revenue Code, moreover, the limits on the amount of contributions deductible are determined "as if all participants in the plan were employed by a single employer." 26 U.S.C. § 413(b)(7). *See Bituminous Coal Operators Ass'n v. Connors*, 867 F.2d 625, 628 (D.C. Cir. 1989). And consistent with the pooling of contributions and benefit liabilities, ERISA as originally enacted imposed upon employers a contingent termination liability based upon the aggregate unfunded liabilities of a terminating multiemployer plan. 29 U.S.C. § 1364 (1976). The pooling concept applicable to multiemployer pension plans has, accordingly, been deeply embedded in federal law for decades.

C. *The Statutory Process For Calculating Withdrawal Liability.*

Withdrawal liability is an employer's statutory share of the plan's "unfunded vested benefits," 29 U.S.C. § 1381(b)(1); thus, the first step in calculating withdrawal liability is calculating the plan's unfunded vested benefits. The plan's actuary, who is subject to regulatory and professional standards, 29 U.S.C. §§ 1241, 1242; 26 U.S.C. § 7701(a)(35); *see* 20 C.F.R. §§ 901.1-.71, determines the present value of a plan's liability for vested benefits in an actuarial valuation performed at least triennially, and in many plans, annually. *See* 29 U.S.C. §§ 1082(c)(9), 1393(b)(1). The actuarial valuation is a snapshot, as of a given date, of the present value of the plan's liability for those benefits.

To arrive at the present value of a plan's liability for vested benefits, the actuary must employ certain assumptions and methods. 29 U.S.C. § 1393(a). In general, after arriving at a total value of all vested benefits then earned by all participants, the actuary must discount that value by using certain actuarial assumptions. The actuary knows, for example, that some participants will die before receiving all or a portion of their benefits. Accordingly, the actuary uses a mortality assumption to discount the total value to reflect this contingency. Similarly, the actuary knows that some vested benefits will be satisfied by earnings on assets the plan is expected to accumulate for decades into the future. Consequently, the actuary uses actuarial interest rate assumptions to discount the liability for estimated future investment earnings over the period—often 40 years or longer—during which the vested benefits will be paid.[6] By law, the actuary's assumptions and methods must be "in the aggregate, . . . reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a).[7]

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[6] As noted in the concurring opinion in *Connolly*, if the actuary's assumptions prove too conservative, the plan might have excess assets with which to increase benefits. 475 U.S. at 233. In the event the assumptions prove overly optimistic and the assets do not grow as projected, the plan may later have to increase the amount of required contributions; however, the law generally does not permit accrued benefits to be reduced. *See* 26 U.S.C. § 411(d)(6).

[7] PBGC is authorized to issue regulations governing such assumptions, 29 U.S.C. § 1393(a), but, due to the varying demographics and investments among multiemployer plans, has not determined it necessary to do so. MPPAA's "reasonable in the aggregate" standard, however, has a well-settled meaning in both the actuarial profession and the law. The standard is virtually identical to that contained in 29 U.S.C. § 1082(c)(3)(A)(ii) and 26 U.S.C. § 412(c)(3)(A)(ii), which govern actuarial assumptions used for determining the contributions required to be made to multiemployer pension plans. *See generally* D. McGill, *Fundamentals of Private Pensions* 242 (5th ed. 1984) [hereinafter "McGill"]; *Wachtell, Lipton, Rosen & Katz v. Commissioner*, No. 14574-90, slip op. at 9-18 (T.C. July 14, 1992).

After calculating the present value of the plan's vested benefits, the actuary deducts the value of the plan's assets to determine the amount of the plan's unfunded vested benefits. 29 U.S.C. § 1393(c). The actuary's valuation is then presented to the trustees of the plan.

In the second step in the process, the trustees must allocate the unfunded vested benefits pursuant to one of four statutory allocation methods, or a method approved by PBGC. 29 U.S.C. § 1391.[8] Respondent used the "presumptive" method set forth in 29 U.S.C. § 1391(b), which, as a "construction industry" plan, it is required to use for the plan's construction employers. *See* 29 U.S.C. § 1391(c)(1); 29 C.F.R. § 2642.2. Under that method, the plan determines a withdrawing employer's proportional share of each of three different categories of unfunded vested benefits.[9] Generally, the employer's share is derived from fractions comparing the employer's required contributions during a 5-year period to the contributions made by all employers during the same period. 29 U.S.C. § 1391(b)(2)(E)(ii), (b)(3)(B), (b)(4)(D)(ii).

In the third step, the trustees determine whether and when an employer has withdrawn. *See* 29 U.S.C. §§ 1383, 1385. Then, after considering on the basis of available facts whether any of MPPAA's "forgiveness provisions" apply, *see, e.g.*, 29 U.S.C. § 1405, the trustees issue a notice and demand for withdrawal liability. 29 U.S.C. § 1399(b)(1).

[8] By law, the trustees must select an allocation method before the withdrawal of any employer to which the method is applied. 29 U.S.C. § 1394(a). Likewise, all allocation methods are based on actuarial valuations performed for plan years preceding the employer's withdrawal, 29 U.S.C. § 1391, and the allocation method must "operate and be applied uniformly with respect to each employer." 29 U.S.C. § 1394(b).

[9] Those categories are (1) the employer's proportional share of post-1980 changes in the unfunded vested benefits; (2) its share, if any, of pre-1980 unfunded vested benefits; and (3) its share of reallocated unfunded vested benefits, if any (*i.e.*, amounts uncollectible or unassessable for reasons described in 29 U.S.C. § 1391(b)(4)). 29 U.S.C. § 1391(b)(1)(A), (B), (C).

The fourth step is mandatory conciliation. *See* 29 U.S.C. § 1399(b)(2). The employer is entitled to ask the trustees to review any specific matter relating to the determination of liability, identify any inaccuracies in the determination, or furnish any additional relevant information. 29 U.S.C. § 1399(b)(2)(A). The trustees then review the issues raised by the employer and notify the employer of their determination. 29 U.S.C. § 1399(b)(2)(B).[10]

The fifth step in the process, if a disagreement persists, is arbitration. The arbitration is to be conducted "in accordance with fair and equitable procedures," 29 U.S.C. § 1401(a)(2), that have been promulgated by the PBGC. *See* 29 C.F.R. pt. 2641. Unlike the calculation and issuance of the demand, 29 U.S.C. § 1399(b)(1), or the informal dispute resolution process of section 1399(b)(2), the arbitration is a trial-type adjudication. *See* PBGC Op. Ltr. 91-7 (Oct. 1, 1991) (MPPAA arbitration is a "hearing" that "afford[s] each side a full and equal opportunity to be heard").

In a MPPAA arbitration, both parties are typically represented by counsel. 29 C.F.R. § 2641.5(c). There is discovery similar to that under the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2641.4(a)(2). The parties file pre-hearing statements and exchange witness lists, 29 C.F.R. § 2641.4(a)(2); there is a hearing on the record, 29 C.F.R. § 2641.5(d); and each party may present witnesses and documentary evidence, and cross-examine the other party's witnesses. 29 C.F.R. § 2641.5(e)(3). The arbitrator is empowered to issue subpoenae for the

[10] This "informal review" is a "private ordering" that serves to "clarify and perhaps pare down the issues," *Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808 F.2d 66, 78 (D.C. Cir. 1987), and may eliminate the need for litigation.

attendance of witnesses and the production of documents. 29 C.F.R. § 2641.4(a)(4). The parties are entitled to file post-hearing briefs. 29 C.F.R. § 2641.5(g). The arbitrator files a written opinion, giving the reasons for his award, including findings of fact and conclusions of law. 29 C.F.R. § 2641.7(a)(1). And this opinion may be reviewed in federal district court, 29 U.S.C. § 1401(b)(2), where the arbitrator's findings of fact may be reversed only if contrary to "a clear preponderance of the evidence." 29 U.S.C. § 1401(c). Questions of law are reviewed *de novo*. *See Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405, 1411 (7th Cir. 1989).

Depending on the issues raised in the arbitration, two "presumptions" may be applicable. First, any factual determination made by the plan trustees under sections 1381 through 1399 and section 1405 "is presumed correct unless the [employer] shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A).[11] Second, the actuary's determination of a plan's unfunded vested benefits "is presumed correct unless [the employer] shows by a preponderance of evidence that—(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods." 29 U.S.C. § 1401(a)(3)(B).

[11] This provision is limited to factual determinations; by contrast, on questions of law, the arbitrator is directed to "follow applicable law," 29 C.F.R. § 2641.4(a)(1), and decide the case in the manner of a trial judge, as opposed to a commercial or labor arbitrator who tries to reach a compromise. *See* 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (statement of Rep. Thompson).

SUMMARY OF THE ARGUMENT

Petitioner Concrete Pipe and Products of California, Inc. ("Concrete") challenges a withdrawal liability assessment by the Construction Laborers Pension Trust of Southern California (the "Plan") that has been upheld by an independent arbitrator and two federal courts.[12] Concrete challenges the presumptions in 29 U.S.C. § 1401, but only the presumption in favor of actuarial assumptions is properly before the Court, and that presumption in no way implicates the "biased decisionmaker" case law on which Concrete relies. Moreover, even if the presumption afforded the factual determinations of plan trustees—which does nothing more than shift the burden of persuasion to the employer—were before the Court, Concrete's arguments rest on a mischaracterization of the non-adjudicatory functions that plan trustees perform in assessing liability. The trustees' role does not implicate due process concerns because it is ministerial and quasi-prosecutorial rather than adjudicative, and their institutional bias, if any, is remote and insubstantial. And, in any event, 29 U.S.C. § 1401(a) and regulations promulgated thereunder provided Concrete a plenary trial-type hearing before an independent adjudicator; consequently, the burden of proof did not deprive Concrete of a full and fair opportunity to present its case.

Concrete's contention that MPPAA violates substantive due process and the "takings" clause of the Fifth Amendment is controlled by this Court's unanimous decisions in *Connolly* and *Gray*. Concrete's arguments, moreover, rely on a misunderstanding of the nature of multiemployer

[12] The Ninth Circuit agreed with the arbitrator that Concrete's withdrawal occurred in 1981, after the effective date of MPPAA, J.A. at 216, 379, 431-32, and this Court declined to review the question. The Ninth Circuit also agreed with the arbitrator's reduction of the amount assessed, J.A. at 402, 432, a ruling neither party now contests. Accordingly, neither of these issues is before the Court.

pension plans, and ignore the fact that Concrete was on notice when it joined the Plan that the Plan was underfunded, that it could be responsible for a share of that underfunding on the basis of its contributions to the Plan, and that ERISA had invalidated liability disclaimer clauses like the one on which Concrete now relies.

All of Concrete's challenges are, consequently, without merit, and the decision of the court below should, therefore, be affirmed.

ARGUMENT

I. CONGRESS'S CHOSEN METHOD FOR RESOLUTION OF WITHDRAWAL LIABILITY DISPUTES DID NOT DENY CONCRETE PROCEDURAL DUE PROCESS.

Five of the six Courts of Appeals that have considered the issue have upheld both of the presumptions in 29 U.S.C. § 1401(a)(3) against procedural due process attack.[13] Only the Court of Appeals for the Third Circuit held otherwise, and that court addressed only the presumption in section 1401(a)(3)(A) applicable to factual determinations by plan trustees.[14]

Here, without distinguishing between the two presumptions, Concrete obtained a writ of certiorari with respect to a question regarding "the presumptions in 29 U.S.C.

[13] *Keith Fulton & Sons v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1137, 1140-43 (1st Cir. 1985) (en banc); *Board of Trustees v. Thompson Bldg. Materials*, 749 F.2d 1396, 1403-04 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Washington Star*, 729 F.2d at 1511; *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir.), *cert. denied*, 467 U.S. 1259 (1984); *Republic Indus. v. Teamsters Joint Council No. 83*, 718 F.2d 628, 639-41 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

[14] *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd by equally divided vote sub nom. PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987).

§ 1401." In fact, however, only the presumption in section 1401(a)(3)(B)—the presumption afforded actuarial assumptions and methods—is properly before the Court.[15] That presumption does not even arguably implicate the "biased decisionmaker" line of cases on which Concrete relies, and the decision of the court below should, therefore, be affirmed.

A. Enrolled Actuaries, Not Plan Trustees, Are Responsible for Selecting Actuarial Assumptions.

Concrete argues that plan trustees perform an adjudicative function when they choose the actuarial assumptions used to calculate withdrawal liability, and that they are institutionally incapable of impartiality in performing this function. However, the selection of actuarial assumptions with which to calculate a plan's unfunded vested benefits is the responsibility of the plan's enrolled actuary, not the trustees.

Congress made it clear that actuarial assumptions must be "independently determined by the actuary," and that

[15] Of the three issues raised by Concrete in contesting the Plan's withdrawal liability assessment, only resolution of the actuarial assumption issue was potentially affected by use of a presumption. Both the arbitrator and the district court decided the date of withdrawal issue without regard to the presumptions in section 1401(a)(3), *see* J.A. at 205-16, 419-22, and Concrete prevailed as to the appropriate contribution history to be used in calculating its liability. And while the arbitrator referred to the statutory presumptions in his decision regarding Concrete's challenge to the Plan's actuarial assumptions, even there, he recited the presumptions only after having already reached his conclusion. *See* J.A. at 378-402.

Section 1401(c) also provides that, upon review of an arbitrator's decision, the district court is to presume, unless rebutted by a "clear preponderance of the evidence," that the findings of fact made by the arbitrator were correct. Here, however, the district court expressly found that the arbitrator's factual conclusions and inferences were reasonable, and not even "contrary to a *mere* preponderance." J.A. at 421 (emphasis added). Concrete was, therefore, also unaffected by this statutory presumption.

plan trustees may not "substitute [their] judgment in these matters for that of a qualified actuary." S. Rep. No. 383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4954. *See Keith Fulton*, 762 F.2d at 1141 n.3. Indeed, where it has been found that a plan's actuarial assumptions were *not* the actuary's "best estimate," but were instead dictated or influenced by the trustees, they have been struck down. *See, e.g., Casablanca Indus. v. UFCW Local 23—Giant Eagle Pension Fund*, 7 Employee Benefit Cas. (BNA) ("E.B.C.") 2705 (1986) (Jaffe, Arb.), *aff'd in relevant part sub nom. Huber v. Casablanca Indus.*, No. 87-0077, slip op. (W.D. Pa. Oct. 30, 1989), *aff'd*, 916 F.2d 85 (3d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3503 (U.S. Jan. 9, 1991); *cf. Carnation Co. v. Central States Pension Fund*, 9 E.B.C. 1409, 1428-29 (1988) (Nagle, Arb.). Moreover, if the actuary allows himself to be subjected to improper influence, his enrollment can be suspended or terminated. 29 U.S.C. § 1242(b).

Actuaries are, of course, in no sense "biased decisionmakers." Rather, they are trained and licensed experts charged by Congress with establishing the assumptions necessary for calculating a plan's unfunded vested benefits.

Congress's decision to assign this task to actuaries was eminently reasonable. In 1974, Congress had entrusted the determination of actuarial assumptions and methods for funding purposes to the professional judgment of the plan's enrolled actuary, 26 U.S.C. § 412(c)(3)(A), 29 U.S.C. § 1082(c)(3)(A), because "proper actuarial assumptions may differ substantially between industries, among firms, geographically, and over time. . . . [Thus,] any attempt to specify actuarial assumptions . . . would in effect place . . . plans in a straitjacket so far as estimating costs is concerned, and would be likely to result in cost estimates that are not reasonable." H.R. Rep. No. 807, 93d Cong., 2d Sess. 27 (1974), *reprinted in* 1974

U.S.C.C.A.N 4670, 4694. Six years later, when enacting MPPAA, Congress again turned to the actuarial profession to establish actuarial assumptions for withdrawal liability purposes, and adopted the same "reasonable" and "best estimate" standards for that purpose that had been in use for funding purposes. 29 U.S.C. § 1393(a). At the same time, Congress limited challenges to a showing that the actuary failed to conform to these standards. 29 U.S.C. § 1401(a)(3)(B). This limitation was necessary

> to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally "correct" approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer--tactics that could, and could be intended to, result in prohibitive collection costs to the plan. The presumption can be rebutted in those cases where injustice would otherwise result to the withdrawing employer.

Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess. *S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (Comm. Print 1980) [hereinafter "Senate Labor Summary"]. *Accord* H.R. Rep. No. 869, pt. 1, at 86.

When challenging the actuary's unfunded vested benefit determination, however, the employer need only show "by a preponderance of the evidence" that "the actuarial assumptions and methods used . . . were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations)," 29 U.S.C. § 1401(a)(3)(B)(i), or that the actuary made a "significant error" in applying them. 29 U.S.C. § 1401(a)(3)(B)(ii). Congress's decision to place the burden on employers to show that the actuarial assumptions are "unreasonable" makes sense, because actuarial assumptions are predictions about events that will occur over decades. *See Michigan United Food and Commercial Workers Pension Fund*

v. Eberhard Foods, Inc., 831 F.2d 1258, 1261 (6th Cir. 1987); *Keith Fulton*, 762 F.2d at 1143-44. Such assumptions cannot be said to be "correct" or "incorrect" unless one is willing to wait until the final participant dies and his annuity ceases, often 40 years or longer. Thus, imposing the burden on employers was in no way arbitrary. It simply reflected Congress's desire to avoid "lengthy, futile and costly bickering" over "matters with respect to which there are often several equally 'correct approaches,'" *Keith Fulton*, 762 F.2d at 1143 & n.7 (citations omitted), by which employers could "effectively nullify their obligation" by forcing the plan "to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, pt. 1, at 86. *See also* Senate Labor Summary, *supra*, at 20-21. Such rational choices pass constitutional muster. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976); *Lavine v. Milne*, 424 U.S. 577, 585 (1976).

Nothing in the record here, moreover, indicates that Concrete was denied a fair hearing on the actuarial assumptions issue. The arbitrator, as the trier of fact, made a credibility determination that the Plan's enrolled actuary, a principal in a major firm that serves many multiemployer plans, was more persuasive than the employer's actuary, who had no multiemployer plan experience and who insisted that *only* the rates his firm used for its single-employer plan clients were reasonable. J.A. at 397-98. The district court agreed with the arbitrator. J.A. at 423. Notably, the statutory burden of proof has not prevented other employers from successfully challenging actuarial assumptions, including the interest rate assumptions that are the object of Concrete's attack.[16] That Concrete was unable to meet its burden in

[16] *See, e.g., Carnation*, 9 E.B.C. 1409 (actuarial assumptions and methods for imputing age and service data unreasonable and not actuary's "best estimate"); *Casablanca*, 7 E.B.C. 2705 (actuarial asset valuation not "best estimate" where dictated to actuary by trustees); *Woodward Sand Co. v. Operating Eng'rs Pension Trust*, 3 E.B.C. 2351 (1982) (Kaufman, Arb.) (actuarial assumption of rate of return on investment unreasonable).

this case is not a basis for finding that burden constitutionally defective.

B. The Presumption Afforded the Factual Determinations of Plan Trustees Does Not Violate Procedural Due Process.

1. *Plan Trustees Perform No Quasi-Judicial Function and Have No Disabling Bias.*

Even if the presumption afforded the trustees' factual determinations were properly before the Court, it in no way implicates procedural due process concerns because plan trustees are neither "decisionmakers" nor "biased" in a constitutional sense.

The trustees' determination and demand for withdrawal liability is more the functional equivalent of the issuance of a civil complaint or administrative charge than an adjudication, as in *Marshall v. Jerrico*, 446 U.S. 238 (1980). In *Jerrico*, a federal agency administrator determined violations of a child labor law and assessed penalties under the statute, but the validity of the assessment was decided *de novo* by an administrative law judge. Like the administrator in *Jerrico*, the plan trustees under MPPAA "perform[] no judicial or quasi-judicial functions. [They] hear[] no witnesses and rule[] on no disputed factual or legal questions." *Jerrico*, 446 U.S. at 247. *Accord Stump v. Sparkman*, 435 U.S. 349, 360 (1978).

Rather, their functions of identifying employer withdrawals and applicable exemptions, calculating liability based on the actuary's valuation of unfunded vested benefits, demanding payment, and participating in informal review as a prelude to arbitration, all pursuant to explicit statutory directives, are "akin to that of a prosecutor or

civil plaintiff." *Jerrico*, 446 U.S. at 247. "[T]he strict requirements of neutrality cannot be the same . . . as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime." *Id.* at 250.

Even if plan trustees could be considered "adjudicators" in making their demand, they have no disqualifying bias. Trustees, who either receive a fixed salary or serve without pay if they are union or employer officials, 29 U.S.C. § 1108(c)(2), have no obvious, direct, or personal pecuniary interest in the outcome of withdrawal liability disputes. *Compare Jerrico*, 446 U.S. at 247, *with Tumey v. Ohio*, 273 U.S. 510 (1927). Nor, on this record, is there any evidence of actual bias against Concrete. *See, e.g., Taylor v. Hayes*, 418 U.S. 488 (1974).

Concrete points to trustees' fiduciary obligations as a putative source of bias. But fiduciary obligations do not permit or require a fiduciary to seek more from employers than the statute permits, nor to work at the outer limits of the permitted range of reasonableness.[17] To the contrary, in proper cases trustees may prudently compromise withdrawal liability claims. *See* 126 Cong. Rec. S23,288 (daily ed. Aug. 26, 1980) (statement of Senators Williams and Javits). *See also* Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12,740 (1976). By acting lawfully and reasonably, plan trustees are "without [the] apprehension of personal consequences" and "without [the] fear of suit" that would disqualify them from what Concrete erroneously suggests is a quasi-judicial function. *Stump*, 435 U.S. at 363, 364. *See* 29

[17] *See, e.g., Casablanca*, 7 E.B.C. 2705 (trustees impermissibly directed actuary to develop conservative assumptions benefiting fund at the expense of withdrawing employer, and thus assumptions did not represent actuary's "best estimate"). *See also Anita Foundations, Inc. v. ILGWU Nat'l Retirement Fund*, 902 F.2d 185, 190 (2d Cir. 1990) ("[t]he Fund cannot shield itself from liability by hiding behind its fiduciary status").

U.S.C. § 1323 (action or withholding of action required under Title IV of ERISA not a breach of fiduciary duty).

2. *A MPPAA Arbitration Provides an Employer with a Full and Fair Opportunity to Challenge a Withdrawal Liability Assessment.*

After the trustees have assessed liability and informal review has narrowed the issues to the extent possible, an independent arbitrator hears evidence in a plenary proceeding that approximates a trial. 29 C.F.R. §§ 2641.3(b) & (c), 2641.4, 2641.5. In this trial-type proceeding, the employer and the plan trustees are litigants, and the arbitrator takes evidence, makes credibility determinations and findings of fact, and issues a decision. 29 C.F.R. pt. 2641. He does *not* merely review a prior determination or record in the manner of an appellate tribunal. Indeed, there is no pre-existing record. Rather, the arbitration proceeding is in effect a trial *de novo* at which the employer may present any cognizable issue to the arbitrator, regardless of whether the issue was raised at the informal review stage. *See* PBGC Op. Ltr. 91-7 (Oct. 1, 1991).

In the arbitration proceeding, no issue is irrebuttably presumed in the plan's favor, and thus no "determinative issue" is foreclosed from independent arbitral consideration. *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).[18] Indeed, the "presumptions" here do not operate like traditional presumptions at all. With a true "presumption," once a party proves fact A, fact B is deemed to be true. *See, e.g., Mathews v. Lucas*, 427 U.S. 495 (1976) (upon proof of specified facts, child is presumed to have been a dependent of deceased parent). But the "presumptions" in section 1401(a) merely shift the burden of proof to

[18] Cases rejecting "irrebuttable presumptions" under the Due Process Clause, *see, e.g., United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441, 453 (1973), are accordingly distinguishable.

the employer to show that the plan was wrong.[19] Thus, the plan need not prove affirmatively every element underlying its claim: the employer must first come forward with its case, and the plan need only rebut the evidence the employer adduces. *See Washington Star*, 729 F.2d at 1511.

"Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine*, 424 U.S. at 585. A legitimate allocation of the burden of proof need only have a rational basis, and assure that, in practical effect, a party is not precluded from presenting its case. *See, e.g., Turner Elkhorn*, 428 U.S. at 27-30; *Mobile, J. & K.C. Ry. v. Turnipseed*, 219 U.S. 35, 43 (1910). "There are no hard-and-fast standards governing the allocation of the burden of proof . . . . [It] 'is merely a question of policy and fairness based on experience in the different situations.'" *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973) (quoting *Wigmore on Evidence* § 2486 (3d ed. 1940)). To prevail in a MPPAA arbitration, an employer need only prove "by a preponderance of the evidence," the traditional civil standard, that the plan trustees' initial determination of factual matters under MPPAA are "unreasonable" or "clearly erroneous," 29 U.S.C. § 1401(a)(3)(A).

Numerous aspects of a withdrawal liability assessment can be and are challenged under this standard. On such issues as the amount of the employer's required contributions, *see* 29 U.S.C. § 1391(b)(2)(E), the employer can overcome the "presumption of correctness" if it simply shows by a preponderance of the evidence that the plan made a mathematical mistake.[20] An employer may

[19] This Court has recognized that a statutory provision may be stated as a rebuttable presumption, but in fact do nothing more than allocate the burden of persuasion to a particular party. *See Lavine*, 424 U.S. at 584.

[20] *See, e.g., H.C. Elliott, Inc. v. Carpenters Pension Trust Fund*, 13 E.B.C. 1962, 1966 (1991) (Kagel, Arb.).

also challenge such determinations as the fact and date of a withdrawal as well as the availability of statutory exemptions and moderating provisions,[21] and to the extent that these determinations involve factual disputes, the employer can overcome the "presumption of correctness" by coming forward with a preponderance of evidence to the contrary.[22] To the extent that such disputes entail statutory interpretation, the arbitrator makes an independent judgment, based on "applicable law, as embodied in statutes, regulations, court decisions, interpretations of the agencies charged with the enforcement of the Act, and other pertinent authorities." 29 C.F.R. § 2641.4(a)(1).[23] Indeed, as Concrete concedes, the arbitrator in this case, interpreting 29 U.S.C. § 1384, reduced Concrete's liability by over 25 percent because the Plan had erroneously included a predecessor employer's contribution history in its calculation. J.A. at 392-93; Pet. Br. at 18 n.9.

[21] It is perfectly reasonable to require the employer to bear the burden of proof on such issues, since it will usually have superior access to the facts concerning such issues as the date it ceased operations, 29 U.S.C. § 1383(a), the existence of a labor dispute, 29 U.S.C. § 1398(2), or the existence of a qualifying sale of assets, 29 U.S.C. § 1384. *See generally* 9 *Wigmore on Evidence* § 2486 (Chadbourn rev. ed. 1981).

[22] *See, e.g., Building Servs. Employees Pension Trust v. Ogden Allied Servs. Corp.*, 10 E.B.C. 1401, 1410 (1988) (Brand, Arb.) (factual determination regarding timeliness of withdrawal liability demand); *PMTA-ILA Pension Fund v. E.W. Coslett & Sons, Inc.*, 6 E.B.C. 2705, 2714-15 (1985) (Jaffe, Arb.) (factual determination regarding "closed facility" reduction under 29 U.S.C. § 1397).

[23] *See, e.g., Ogden*, 10 E.B.C. at 1410-14 (plan's interpretation of section 1385(b)(2)(A)(i) and determination of partial withdrawal overturned, applying traditional tools of statutory construction); *Del Monte Corp. v. Bakery & Confectionery Union & Indus. Pension Fund*, 8 E.B.C. 1574, 1577-81 (1986) (Nagle, Arb.) (plan's attribution of contribution history to purchaser contrary to plain language of 29 U.S.C. § 1384); *Coslett*, 6 E.B.C. at 2716 (plan's determination of date of withdrawal incorrect under 29 U.S.C. § 1383(e)).

The standards of 29 U.S.C. § 1401(a)(3) are accordingly rational and do not "foreclose[] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975). Indeed, as the arbitration decisions cited above clearly indicate, arbitrators have had no difficulty applying independent judgment to questions of credibility, fact, and law, notwithstanding the statutory "presumptions." And this is precisely what was done by the arbitrator in this case. J.A. at 205-16, 378-402.

II. CONCRETE'S SUBSTANTIVE DUE PROCESS AND TAKINGS CHALLENGES ARE CONTROLLED BY *CONNOLLY* AND *GRAY*.

Concrete's substantive due process and takings arguments are controlled by the Court's unanimous decisions in *Gray* and *Connolly*, upholding MPPAA against "facial" attacks on these grounds. Concrete attempts to show that MPPAA is unconstitutional as applied in this case; however, virtually all of its arguments were fully addressed by the Court's prior decisions. To the extent they were not, they reflect a fundamentally flawed understanding of multiemployer plans.

A. MPPAA Did Not Deny Concrete Substantive Due Process.

Concrete argues that it was irrational for Congress to link the amount of its withdrawal liability to its contributions to the Plan. As this Court held in *Gray*, however, Congress plainly had a rational and sound purpose for enacting MPPAA—to discourage employer withdrawals from multiemployer plans. 467 U.S. at 730. Congress was concerned, after the passage of ERISA, that multiemployer plans would experience an increase in employer withdrawals and a diminishing contribution base, causing failing plans to overwhelm PBGC's insurance program. *See* pp. 2-3, *supra*. Withdrawal liability, which represents the withdrawn employer's proportionate share of the plan's underfunding, restores the loss to the

plan's contribution base caused by the employer's withdrawal. *See generally Gray*, 467 U.S. at 721-25; *Peick v. PBGC*, 724 F.2d 1247, 1267 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). It was, therefore, perfectly logical for Congress to base an employer's liability on its prior contributions to the plan.

In *Connolly*, this Court observed that Congress's allocation of liability to employers who participated in a plan was a reasonable legislative choice:

> We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble.

475 U.S. at 227. Whether Congress should have chosen one particular cost-spreading formula over another to achieve its purpose is "not a question of constitutional dimension." *Turner Elkhorn*, 428 U.S. at 19 (citations omitted). Indeed, numerous decisions of the Court teach that federal courts do not sit as a super-legislature to reassess the wisdom of a given legislative formula. *E.g.*, *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451 (1985); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).[24]

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[24] Congress did, in fact, legislate an alternative method for allocating a plan's unfunded liabilities that directly links an employer's withdrawal liability to the benefits earned by its employees. *See* 29 U.S.C. § 1391(c)(4). However, "[f]or most multiemployer plans, the method would be completely impracticable . . . more expensive and more cumbersome." McGill, *supra*, at 574; *see also* J. Stephen Caflisch, *Employer Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980*, 9 Pens. Rep. (BNA) 182, 190 (1982) (direct attribution method "would require extensive data that most plans do not have . . . [and] is fundamentally inconsistent with the basic nature of multiemployer plans"); Frank Cummings and Alicia Kershaw, *Multiemployer Plans—Special Rules*, 359-2d Tax Mgmt. (BNA) A-15 (1990) [hereinafter "Cummings"].

Here, because Congress was concerned about withdrawals resulting in a diminishing contribution base for multiemployer plans, it linked an employer's withdrawal liability to its contributions, and then also designed an installment payment schedule for the liability that allows an employer to pay on roughly the same basis as it had been contributing. *See* 29 U.S.C. § 1399(c)(1); H.R. Rep. No. 869, pt. 1, at 82-83.[25] Congress thus "approach[ed] the problem of cost spreading rationally." *Turner Elkhorn*, 428 U.S. at 19. Due process requires no more. *Id. Accord Ferguson*, 372 U.S. 726; *Lee Optical*, 348 U.S. 483.[26]

Concrete next argues that MPPAA violates due process by imposing liability when "none of its employees participated long enough to have any 'vested service' attributable to employment [with Concrete]." Pet. Br. at 28. Referring to the concurring opinion of Justices O'Connor and Powell in *Connolly*, which suggests that the imposition of withdrawal liability might, under certain circumstances, raise due process concerns, Concrete contends the statute is constitutionally infirm because "there is no relationship" between Concrete's conduct and any detriment to its employees. Pet. Br. at 27. However, Concrete's

[25] *See also* Gerald Cole and Ellen Hennessy, *Multiemployer Withdrawal Liability*, 1 Pens. and Profit Sharing (P-H) ¶ 1010, at 1016 (1984) (installment payment schedule "maintain[s] roughly the same level of payments as the employer's required contributions before withdrawal").

Contributions, moreover, reflect the size of a withdrawing employer's workforce, and a larger workforce equates with more employee service, which gives rise to additional benefits under the plan. Consequently, a contribution-based fraction reflects both the employer's workforce and the liabilities it has imposed upon the plan.

[26] Significantly, the contingent termination liability established by ERISA was also based on the amount of an employer's contributions to a multiemployer plan. *See* 29 U.S.C. § 1364 (1976). Because Concrete joined the Plan after the enactment of ERISA, it was on notice that it was undertaking a potential liability for the Plan's underfunding based on its share of the contributions to the Plan. *Connolly*, 475 U.S. at 226-27.

argument simply ignores the design and function of multiemployer pension plans.

As discussed above, the essence of a multiemployer pension plan is the pooling of assets and liabilities by a group of employers. *See* McGill, *supra*, at 78-79. Typically, employers agree to contribute a certain amount for each hour an employee works—a collectively bargained formula that reflects numerous actuarial assumptions about the demographics of the entire pool of participants, rather than those of any particular employer's workforce. *See generally* Cummings, *supra*, at A-2; McGill, *supra*, at 237-38, 376. The plan then combines the contributions of all of the employers and pays benefits out of the pool of funds to the broader universe of plan beneficiaries. Thus,

> [t]he whole purpose behind multiemployer pension plans is to pool resources to pay all participants their accrued benefits; withdrawal liability serves the purpose of protecting the pool and thus the "benefit security" of participants in the plan. Withdrawal liability is therefore more than an obligation to one's employees; it is an obligation to the Fund, the participants in it, and the other contributing employers.

Central States Pension Fund v. Bellmont Trucking Co., 610 F. Supp. 1505, 1513 (N.D. Ind. 1985), *aff'd*, 788 F.2d 428 (7th Cir. 1986) (citations and footnote omitted). Accordingly, because employers participating in a multiemployer plan have, by definition, elected to pool contributions and share the costs of providing benefits to their employees, it was in no way unreasonable for Congress to require that those employers pay their share of that unfunded liability upon leaving. It was instead rationally related to MPPAA's purposes of "discourag[ing] voluntary withdrawals" and "cushion[ing] the financial impact [of withdrawals] on the plan." *Connolly*, 475 U.S. at 217. *See also* 29 U.S.C. § 1001(a)(4), (c)(2), (c)(3).

Moreover, even though none of Concrete's employees may have vested solely as a result of their service with Concrete, it is possible—indeed, probable—that some of

those employees will vest in their benefits under the Plan when their service with Concrete is added to service with previous and future employers. Under Concrete's reasoning, the employer who fortuitously employed an employee in the year he vested would pay the entire bill. But that is not the way multiemployer plans work. *See Gerber Truck*, 870 F.2d at 1154, 1155; *O'Hare*, 740 F.2d at 173-74.

In the long run, a particular employer's contributions will approach the value of the liabilities associated with its employees. While this proposition may be more uncertain over the short term, that is a risk that a business takes when it joins a multiemployer pool.[27] Moreover, by sharing the costs of providing pensions, employers contributing to multiemployer plans are able to provide a benefit package that is less costly to the employer and more valuable to its employees, *see Washington Star*, 582 F. Supp. at 304, one that "the employer might himself have established in his own economic interest." *Roark v. Boyle*, 439 F.2d 497, 505 (D.C. Cir. 1970). Accordingly, it is not remarkable, and certainly not irrational, that Congress chose to base an employer's withdrawal liability on that employer's contributions to the plan rather than on the benefits paid by the plan to any one set of workers.

Concrete further argues that MPPAA violates substantive due process because it abrogated purported limitations on its liability set forth in its collective bargaining agreement and in the Plan documents. This argument was fully and dispositively addressed in *Connolly*. As the Court there said:

> "Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a

[27] By joining a multiemployer plan, an employer gambles that its employees, as a whole, will vest more regularly and earn benefits higher than the pool median. If that happens, the employer is paying less than if it had contributed to a plan established solely for its own employees.

> subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."
>
> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions.

475 U.S. at 223-24 (quoting *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935)). *See also Turner Elkhorn*, 428 U.S. at 15; *Philadelphia, B. & W. Ry. v. Schubert*, 224 U.S. 603, 614-15 (1912).

Significantly, Concrete joined the Plan post-ERISA. With the enactment of ERISA in 1974, employers were on notice that if they withdrew from an underfunded multiemployer plan, they had a contingent liability for a share of the plan's underfunding. *Connolly*, 475 U.S. at 226-27; *Gray*, 467 U.S. at 721. And Concrete's collective bargaining agreement explicitly recognized that the Plan language purporting to limit liability was valid only "if permitted by law under ERISA," J.A. at 82, which it was not. *See United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982); *Nachman Corp. v. PBGC*, 592 F.2d 947, 957-58 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980).

Finally, Concrete contends that MPPAA is unfairly retroactive as applied to it because a portion of its withdrawal liability stems from unfunded liabilities that existed before it joined the Plan. Concrete was, however, on notice when it voluntarily joined the Plan that it was subject to potential liability under ERISA for its share of the Plan's underfunding. *Cf. Connolly*, 475 U.S. at 226-27. And in any event, the benefit increases about which Concrete complains were required either by court order or by ERISA itself. Pet. Br. at 8-9.[28]

[28] Concrete also insists that it is being held liable for benefit increases that occurred after it temporarily ceased operations in 1979; however, the lower courts ruled that Concrete did not incur

B. The Imposition of Withdrawal Liability Is Not a Taking of Concrete's Property Under the Fifth Amendment.

Because the imposition of withdrawal liability does not violate Concrete's due process rights, "it would be surprising indeed to discover" that "Congress unconstitutionally had taken the assets of [Concrete]." *Connolly*, 475 U.S. at 223. And indeed the Court unanimously held in *Connolly* that MPPAA's withdrawal liability provisions do not, on their face, constitute an unlawful taking of property. 475 U.S. at 224. Concrete nevertheless claims that the same provisions are unconstitutional "as applied" here but makes not a single argument in support of that claim that was not addressed dispositively in *Connolly*.[29]

Thus, as in *Connolly*, Concrete contends that the economic impact of MPPAA is severe because the amount of withdrawal liability imposed on it allegedly comprises a significant portion of its net worth. *Connolly*, 475 U.S. 223. But, as the Court observed, "[i]n the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others." *Id.* The Court further noted that the assessment "is not made in a vacuum" but "directly depends on the relationship between the employer and the plan to which it had made contributions." *Id.* at 225. Here, moreover, the assessment was significantly moderated by an installment payment schedule, in this case eleven years long. *See* 29 U.S.C. § 1399(c)(1); J.A. at 91. Thus, "the mere fact that the employer must pay money to comply with

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s withdrawal until it permanently ceased operations in 1981, and that ruling is not before the Court.

[29] Contrary to Concrete's suggestion, this Court's categorical takings analysis has no applicability to this case. *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). In *Lucas*, the Court noted that such analysis has been confined to regulations that "compel the property owner to suffer a physical 'invasion' of his property," and regulations that "den[y] all economically beneficial or productive use of land." *Id.*

the Act is but a necessary consequence of the MPPAA's regulatory scheme." *Connolly*, 475 U.S. at 226.

Pointing to the concurring opinion of Justices O'Connor and Powell in *Connolly*, Concrete makes much of its lack of control over investment, benefit, and other decisions that may have increased the unfunded benefit obligations of the Plan, and argues that there was therefore no relationship between its conduct and the withdrawal liability assessment. But "[a]ctual consideration of [employer] interests is . . . likely, given management's statutory right to select half of the trustees." *Peick v. PBGC*, 539 F. Supp. 1025, 1048 (N.D. Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). And even if Concrete was in fact disempowered, it voluntarily elected to enter into this relationship. *Cf. NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (rejecting identical argument under the National Labor Relations Act). Concrete did, moreover, avail itself of the benefits of a multiemployer plan, including the pooling of assets, liabilities, and administrative costs, and access to a skilled workforce, which are "sufficient compensation" for the "correlative burden" MPPAA placed on it. *See Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

Certainly, the Court's decision in *Connolly* fully disposes of Concrete's contention that it had a "reasonable investment-backed expectation" that the collective bargaining agreement and Plan documents would limit its liability. As the Court held, the government has taken nothing for its own use, but "only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose." *Connolly*, 475 U.S. at 224. Here, moreover, the "contractual provision" itself made clear that it was valid only if "permitted by law under ERISA." J.A. at 82; Pet. Br. at 6.[30]

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[30] Significantly, there was no testimony in this "as applied" challenge that Concrete's employees believed or understood that the Plan's promise of benefits was conditional. *Cf. Connolly*, 475 U.S. at 230-31 (O'Connor, J., concurring).

Finally, as for the nature of the governmental action, as the Court said in *Connolly*, "under the Act, the Government does not physically invade or permanently appropriate any of the employer's assets for its own use" but rather "safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan." 475 U.S. at 225. Thus, Congress simply adjusted the benefits and burdens of economic life in an area that it initially regulated in the LMRA in 1947, and has regulated in comprehensive and reticulated detail in ERISA since 1974. Such economic regulation has long been the province of Congress and does not constitute a taking. *Connolly*, 475 U.S. at 225; *Turner Elkhorn*, 428 U.S. at 15-16.

CONCLUSION

The decision of the Ninth Circuit affirming Concrete's withdrawal liability should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

No. 91-904

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS
OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 89 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), this Court ruled that as a general matter "the imposition of withdrawal liability [under the

Multiemployer Pension Plan Amendments Act] does not constitute a compensable taking under the Fifth Amendment." Each of the reasons given by the *Connolly* Court in support of that ruling is applicable here.

Petitioner's attempt to evade *Connolly* rests on a misapprehension of the statutory scheme. Petitioner, first of all, fails to recognize that, upon withdrawal, petitioner left behind a financial burden on the plan. And, in any event, petitioner's effort to measure a withdrawing employer's financial responsibilities to the plan by a *post hoc* calculation of the benefits due to the employer's employees —and to those employees alone—is contrary to the basic premises of multiemployer pension plans such as the plan here and of the legislation designed to protect the integrity of these plans.

In a multiemployer pension plan, the payment of benefits to the covered employees as a group becomes the responsibility *not* of each employer but of the plan. That being so, MPPAA defines an employer's obligation to contribute to a plan, such as the plan here, upon withdrawal on the same basis as the plan defines the employer's obligation to contribute as an ongoing participant. In this way, MPPAA spreads the cost of the unfunded vested liability of the plan over the class of employers who participated in creating that liability in the same manner that cost would here been spread had all of the participating employers seen the venture through. It may be that petitioner's employees will receive relatively little benefit from petitioner's participation in, and payments into, the plan compared to the benefits received by employes of other participating employers. But that is a possibility that is inherent in every pooling arrangement based, as here, on payments into a fund on one set of criteria and payments out of the fund on another set of criteria.

As long as petitioner was a party to the plan, petitioner received the labor market benefit that participation in the plan provides to all member employers: a pension program that constitutes a significant part of the compensation package for covered employees and that does so on an economically advantageous basis. Neither the Takings Clause nor the Due Process Clause prevents Congress from requiring petitioner to pay its fair share of the ongoing costs of the joint venture to which petitioner was a party.

II. A. MPPAA *does* provide for, and petitioner *has* availed itself of, access to impartial decisionmakers: a neutral arbitrator and a federal judge. Properly analyzed, petitioner's complaint is not addressed to the impartiality of the decisionmakers who passed on its legal challenge to the withdrawal liability the plan assessed, but to Congress' determination of the substantive standards and burdens of proof that those decisionmakers were to apply on that challenge.

Those substantive standards reflect a congressional judgment to preserve an area of discretion for plan trustees, and their actuaries, in choosing among reasonable alternatives with respect to a range of issues that are implicated by MPPAA's statutory scheme. Legal rules that incoroprate a standard of review that is deferential to decisions of private actors are an established means of implementing the public policy determination that in given instances preservation of the ability of private entities to exercise discretion is preferable to regulation by government fiat. The Constitution has never been held to require Congress or the courts to pretend to omniscience or to stultify all private initiative in order to extend the rule of law.

B. MPPAA's presumption in favor of the correctness of arbitral findings of fact is nothing more than the sound rule that, Congress having established arbitration as the preferred forum for finding facts, courts should defer to those findings rather than engage in the fact-finding process on a *de novo* basis.

ARGUMENT

I. PETITIONER'S TAKINGS CLAUSE CLAIM

(a) Petitioner argues that the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act ("MPPAA"), as applied to petitioner in this case, violate the Fifth Amendment's restriction against government takings of private property without just compensation. The facts on which this "as applied" constitutional challenge is based can be summarized in a paragraph:

In 1976, petitioner purchased a plant and adopted the extant collective bargaining agreement covering the plant's employees. The collective bargaining agreement contained a provision requiring petitioner to make contributions to a multiemployer defined benefit pension plan —*viz.* a plan pooling the contributions of a number of employers to provide stated pension benefits to employees who attain eligibility by working a specified number of years for one or more employers participating in the plan.[1] In 1978—after the Pension Benefit Guaranty Corporation ("PBGC") had issued a report to Congress recommending the adoption of an amendment to the federal statutes regulating pension plans to provide that employers that withdraw from multiemployer pension plans be assessed a "withdrawal liability"[2]—petitioner agreed to a new collective bargaining agreement, continuing petitioner's participation in the plan. In 1980, MPPAA was enacted. The 1980 Act requires that employers that withdraw from a multiemployer pension plan pay their aliquot share of the plan's unfunded vested liabilities as of the time of the withdrawal. After the enactment of MPPAA, petitioner conducted only minimal operations involving employees covered by the plan. On December 15, 1981, petitioner withdrew from participation in the plan.[3] At the time of petitioner's withdrawal, none of petitioner's covered employees had sufficient service credits to entitle the employee to a vested pension under the plan's eligibility rules, but each of petitioner's covered employees had earned, in petitioner's employ, service credits toward a vested pension entitlement that the employee could carry over and build upon in employment with any other employer participating in the plan.[4] Petitioner has refused to pay the withdrawal liability required by MPPAA.

(b) In *Connolly v. Pension Benefit Guaranty Corp.*, *supra*, 475 U.S. at 255, this Court ruled that as a general matter "the imposition of withdrawal liability does *not* constitute a compensable taking under the Fifth Amendment." (Emphasis added.) Each of the reasons given by the *Connolly* Court in support of that ruling is applicable here.

As the *Connolly* Court pointed out, MPPAA's withdrawal liability provisions do no more than "safeguard[] the participants in multiemployer pension plans by requiring a withdrawing employer to fund *its share of the plan obligations incurred during its association with the plan.*" *Id.* at 225 (emphasis added). "The assessment of withdrawal liability is not made in a vacuum, . . . but directly

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[1] The plan at issue here is a "defined benefit plan," promising covered employees *a fixed and definite benefit*, rather than a "defined contribution plan" promising a benefit based upon the amount of contributions made to a participant's individual account. *See* 29 U.S.C. § 1002(35); *see also Nachman Corp. v. PBGC*, 446 U.S. 359, 363-64 n.5 (1980).

[2] *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 217 (1986).

[3] In arbitration, petitioner contended that it had withdrawn from the plan prior to the effective date of MPPAA. The Arbitrator rejected this argument and found that December 15, 1981, was the date of withdrawal. J.A. 216. The court below affirmed the Arbitrator's decision in this regard. This Court declined to grant certiorari to review this aspect of the decision below.

[4] *See* 29 U.S.C. §§ 1053(b)(1), 1060(a).

depends on the relationship between the employer and the plan to which it made contributions" (*id.*)—*viz.*, in essence, the withdrawing employer is required to pay the proportion of the plan's unfunded vested liabilities at the time of withdrawal that is equal to the proportion of the plan's contributions paid by the employer during the employer's participation in the plan.[5] The Court added that well prior to the enactment of MPPAA,

> [p]rudent employers . . . had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations. *See* [*PBGC v. R.A. Gray*, 467 U.S. 717, 732 (1984)]. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958). [475 at 227.]

(c) Petitioner contends that *Connolly* does not justify requiring an employer to pay any portion of a multiemployer plan's unfunded liabilities when that employer did not participate in the plan long enough for any of its employees to have obtained a vested right to pension benefits based solely on service with that employer. Petitioner's attempt to evade *Connolly* rests on a misapprehension of the statutory scheme.

At the outset, it should be understood that the fact that as of December 1981—when petitioner withdrew from the plan—none of petitioner's employees was yet vested does not entail the conclusion that petitioner's participation in the plan created no further financial burden to the plan. Petitioner's covered employees received service credits toward an entitlement to a pension under the plan for their time working for petitioner.

[5] This is the general rule under the presumptive method set forth in 29 U.S.C. § 1391(b), which was used in calculating petitioner's withdrawal liability in this case.

Those service credits are portable: in determining each of those employees' total years of credited service, the credit earned through employment with petitioner is combined with the credit earned through employment for other employers participating in the plan. *See, e.g.*, 29 U.S.C. § 1053(b)(1) ("In computing the period of service under the plan . . . all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account . . . ."). Thus, the time worked for petitioner increases the likelihood that petitioner's employees will acquire a vested right to pension benefits from the plan.

It is noteworthy, in this regard, that Congress was well aware of the prevalence of this type of pension portability when it enacted the withdrawal liability provision of MPPAA:

> Pension portability under a multiemployer plan means that a participant's benefit is based on service with all contributing employers for whom the participant has worked. This enables a participant who moves from one contributing employer to another, who might otherwise not be eligible for benefits based on service with any one employer, to receive a pension if his or her total service with all the contributing employers is sufficient to satisfy the plan's requirements for a vested benefit. This feature is particularly but not exclusively important in industries such as construction, water transportation, and the performing arts, which are characterized by mobility of employees, or employers, or rapid turnover, or both. [H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 53 (1990)].

But petitioner's failure to recognize that it left behind a potential financial burden on the plan is only the first flaw in petitioner's analysis. For petitioner's effort to measure a withdrawing employer's financial responsibilities to the plan by a *post hoc* calculation of the benefits due to the employer's employees—and to those employees alone—is contrary to the basic premises of multiemployer

pension plans such as the plan here and of the legislation designed to protect the integrity of these plans.

A multiemployer pension plan is in effect a joint venture of participating employers in which the employers agree to pool the costs of providing pension benefits to their employees. This joint venture provides each participating employer the mechanism to provide—and to gain the labor market benefits of providing—a pension program for its own employees in a manner that allows each employer to spread the risks inherent in any insurance scheme over a larger group. Pensions for the covered employees become the responsibility not of each individual employer but of the plan.

Inherent in the multiemployer plan mechanism is the possibility that employer A may in effect bear some of the cost of providing pension benefits to employer B's employees, as well as the possibility that employer B may in effect bear some of the cost of providing pension benefits to employees of employer A, depending on such factors as the demographic composition of each employer's workforce, employee turnover and the like.

Employer contributions in a multiemployer plan are, moreover, generally geared to some measure of the work done by the employer's covered employees, not to the proportion of the employer's workforce that has attained or will attain a vested right to receive a pension.[6] As just noted, a small proportion of one employer's employees may become entitled to vested pensions while a high proportion of another employer's employees may attain that status. But the contribution responsibility of each employer is not affected by its employees' vesting rate: each employer continues to make an equal contribution based on the quantum of their employees' work.

Against this background, MPPAA defines an employer's obligation to contribute to the plan upon withdrawal

[6] In this case the measure is the number of hours worked by the employer's employees during the contribution period.

on the same basis as the plan defines the employer's obligation to contribute as an ongoing plan participant. Under MPPAA, the withdrawing employer's obligation is geared to the proportion of the plan's contributions paid by that employer during the employer's participation in the plan, not to the number of the employer's employees who have attained or may attain a vested right to pension benefits from the plan.[7]

In this way, MPPAA spreads the cost of the unfunded vested liability of the plan over the class of employers who participated in creating that liability in the same manner that cost would have been spread had all of the joint venturers seen the venture through. MPPAA's withdrawal liability is merely the application in a particular context of the general principle that governs the making of ongoing contributions in a multiemployer plan. Some withdrawing employers may leave behind a higher proportion of employees that have attained or will attain vested status than other withdrawing employers. But, withdrawal liability, measured as it is by the employer's *contribution* experience, rather than its employees' vesting experience, will not be affected by that difference. And, given the nature of the joint venture the employers undertook, that is exactly as it should be.

In sum petitioner on withdrawing from the plan has left behind a number of employees who have attained service credits toward a vested pension. The extent to which those service credits may result in pension obligations of the plan is presently not ascertainable. It may be that petitioner's employees will receive relatively little benefit from petitioner's participation in, and payments into, the plan compared to the benefits received by employees of other participating employers. But that is a

[7] In certain circumstances not applicable here, MPPAA authorizes use of an alternative method for allocating a plan's unfunded vested liabilities that links an employer's withdrawal liability to the benefits earned by its employees. *See* 29 U.S.C. § 1391(c)(4). *See* note 4, *supra*.

possibility that is inherent in every pooling arrangement based on payments into a fund on one set of criteria and payments out of the fund on another set of criteria.

At least of equal moment, whatever the benefit ultimately achieved by petitioner's employees, petitioner received precisely the benefit petitioner sought on entering the plan. As long as petitioner was party to the plan, petitioner received the labor market benefit that participation in the plan provides to all member employers: a pension program that constitutes a significant part of the compensation package for covered employees, and that does so in a manner that takes advantage of cost and risk sharing mechanisms for providing a contingent benefit. Petitioner having achieved that benefit, the Takings Clause does not prevent Congress from imposing on petitioner a fair share of the ongoing costs of the joint venture to which petitioner was a party. The *Connolly* Court's conclusion applies here with equal force:

> The purpose of forbidding uncompensated takings of private property for public use is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble. The employers in the present litigation voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA . . . . Congress determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement. For this reason Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans. We see no constitutionally compelled reason to require the Treasury to assume the financial burden of attaining this goal. [475 U.S. at 227-28.]

II. PETITIONER'S SUBSTANTIVE DUE PROCESS CLAIM

What we have already said suffices to demonstrate that petitioner's substantive due process claim is without merit. Congress' determination that an employer's withdrawal liability should be based on the employer's proportionate share of all employer contributions to the plan over the period of the employer's participation in the plan is, to say the least, rational. Employers that agree to participate in a multiemployer plan normally agree—as is true here—to make contributions based on a measure of employee work done, not on employee benefits due; those contributions are used to fund benefits for *all covered employees*, not just for the contributing employer's own employees. As we have shown in Part I, Congress' decision that withdrawal liability should be calculated based on contribution share simply applies in the withdrawal context the principles that govern the ongoing contribution obligations of participating employers.

III. PETITIONER'S PROCEDURAL DUE PROCESS CLAIM

Petitioner challenges three presumptions adopted in MPPAA that come into play in determining and measuring withdrawal liability. Petitioner argues that these presumptions deprive the withdrawing employer of the right to an impartial decisionmaker and thereby deprive the employer of procedural due process.

As we show, MPPAA *does* provide for, and petitioner *has* availed itself of, access to impartial decisionmakers: a neutral arbitrator and a federal judge. Properly analyzed, petitioner's complaint is not addressed to the impartiality of the decisionmakers who passed on its legal challenge to the withdrawal liability the plan assessed,

but to Congress' determination of the substantive standards and burdens of proof that those decisionmakers were to apply in passing on that challenge. That complaint simply has no merit.

The presumptions petitioners challenged are found in two subsections of MPPAA, 29 U.S.C. § 1401(a)(3), and § 1401(c). We address these subsections separately, in turn.

A.

Title 29 U.S.C. § 1401(a)(3) provides that:

> (A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.
>
> (B) In the case of a determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—
>
> (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
>
> (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

1. Subsection 1401(a)(3)(A) (hereinafter "subsection (A)") thus provides that decisions of the plan sponsor—here the trustees of the plan—shall receive deference upon review by arbitrators or courts in two respects: as to decisions made on matters committed to the trustees' discretion, decisions of the trustees will only be set aside if found to be "unreasonable"—*viz.*, outside the zone of discretion granted to the trustees; as to factual determinations made by the trustees in the course of making decisions covered by this subsection, the trustees' factual determinations will be set aside only if "clearly erroneous."[8]

2. Public law rules that accord a measure of deference to decisions of private actors are an established feature of our legal system. Indeed, such rules are at the heart of the law of trusts. Both at equity and under ERISA, in a variety of circumstances, trustees are granted substantial deference in interpreting and administering their trusts. *See* Restatement (Second) Trusts § 187 (1959); *Bruch v. Firestone Tire & Rubber Co.*, 489 U.S. 101 (1989). The labor law and the law of corporations provide for analogous forms of deference to decisions of private entities. *E.g., Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127, 1136 (1991) (decisions of labor organizations in negotiating and administering collective bargaining agreements are entitled to deference as long as the decisions are within a "wide range of reasonableness"); 3A W. Fletcher, Cyclopedia of the Law of Private Corporations § 1039 (rev. perm. ed. 1975) (decisions of corporate officers are entitled to deference as long as the decisions reflect "reasonable business judgment"); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (same).

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[8] The lower federal courts have uniformly interpreted subsection (A) not to call for deference to decisions by trustees and arbitrators as to the meaning or application of federal law. *Chicago Truck Drivers Pension Fund v. L. Zahn Drug*, 890 F.2d 1405, 1411 (7th Cir. 1989); *Union Asphalts and Roadoils, Inc. v. MoKan Teamsters Pension Fund*, 857 F.2d 1230, 1233-34 (8th Cir. 1988); *Trustees of Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 928-29 (9th Cir.), *cert. denied*, 479 U.S. 822 (1986); *Bd. of Trustees of Western Conf. of Teamsters Pension Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1405-06 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *International Ass'n of Machinists National Pension Fund Benefit Plan C v. Stockton Tri Indus.*, 727 F.2d 1204, 1207 n.7 (D.C. Cir. 1984); *Republic Indus., Inc. v. Teamster Joint Council No. 83 of Va. Pension Fund*, 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

As the foregoing examples show, lawmakers often determine that it is sound public policy to preserve the ability of a private entity to exercise a range of discretion in making decisions subject only to legal limitations at the margin. Legal rules that incorporate a deferential standard of review are a proven means of implementing that public policy determination. If Congress were denied the option of enacting such rules, the Legislature would be compelled to establish rules that specify the *precise* course of conduct the regulated entity must take in *every* given circumstance or to establish a general standard charging the courts (or arbitrators) to determine whether the entity has acted *precisely* as the judge (or arbitrator) believes that general standard requires in the circumstances at hand.

Very simply stated, the Constitution has never been held to require Congress or the courts to pretend to omniscience or to stultify all private initiative in order to extend the rule of law. So far as we are aware, there is no authority for the proposition that a putative claimant has a constitutional right to a cause of action that requires the regulated party to act in one particular way in each conceivable particular circumstance and no other and that assures that a judge or arbitrator will conduct a *de novo* review to determine whether the regulated party has done so. Yet, on analysis, it is just such a right that petitioner claims here.

3. Here Congress determined to preserve the ability of trustees, as fiduciaries bound to act in the best interest of their beneficiaries, to use their discretion in choosing among reasonable alternatives with respect to a range of issues that are implicated in MPPAA's statutory scheme. It is certainly rational, and probably wise, for Congress to conclude that trustees who have a working knowledge and familiarity with the circumstances of particular trusts—and, of necessity, with the industry in which the employers participating in the trust are engaged—are

better able to make decisions on an ongoing basis that properly fit those circumstances than the Legislative Branch, the federal judiciary or an outside arbitrator.

By the same taken, Congress could sensibly conclude that trustees, by reason of their specialized knowledge and expertise, are well suited to make the factual determinations that are integral to their withdrawal liability decisions. This conclusion is sufficient in itself to justify deference to the trustees' factual determinations. It is also very much to the point that if deference were not given to such factual determinations, every decision committed to the trustees' discretion would be subject to review of its factual premises on a *de novo* basis, and the practical effect of such review would be to impede the trustees' ability to carry out their proper role.

The limiting standards of "reasonableness" and "clearly erroneous" written into subsection (A) are, moveover, sufficient to prevent abuse by the trustees of their decisionmaking prerogatives. Other factors as well serve to prevent arbitrary or biased decisions by the trustees. MPPAA specifically requires that a plan's rules for determining withdrawal liability "operate and be applied uniformly with respect to each employer." 29 U.S.C. § 1394(b). The trustees thus cannot adopt *ad hoc* standards to meet a given case but must consider the long term impact of the rules adopted on the interests of the trust. In particular, the trustees of a multiemployer trust must consider the effect of rules respecting withdrawal liability on the willingness of employers to continue participating in the plan or of new employers to become party to the plan. Rules that may be advantageous in the short term but that would be seen as unduly onerous by such employers would not serve the long term interests in the plan. As the House Report on the bill which became MPPAA states:

> Plan fiduciaries are given a great deal of flexibility to strike a balance among the competing considera-

> tions of encouraging new entrants, discouraging withdrawals, easing administrative burdens, and protecting the financial soundness of a fund. The committee wishes to make it clear that in choosing the rules that would eliminate or reduce liability, the choice of such a rule is not *per se* a violation of fiduciary standards; the determination must be made as to whether the fiduciary has acted reasonably and in the interests of plan participants and beneficiaries and otherwise in accordance with the fiduciary standards. [H.R. Rep. No. 869, 96th Cong., 2d Sess. 67.]

And, as the Court of Appeals for the First Circuit has added:

> This commentary makes it clear that the trustees' role is not simply to find the highest value for withdrawal liability; they would not meet their fiduciary duty to the fund, for example if they set excessively high withdrawal liabilities which would have the effect of discouraging future participation. [*Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1137, 1142-43 (1st Cir. 1985).]

4. Much of what we have said to this juncture applies as well to the presumptions adopted in 29 U.S.C. § 1401 (a)(3)(B) (hereinafter "subsection (B)"). Subsection (B) requires deference to the trustees' determination of the plan's unfunded liabilities: the "actuarial assumptions and methods used in the determination" are presumed correct unless shown to be "unreasonable (taking into account the experience of the plan and reasonable expectations)"; the application of these assumptions and methods is presumed correct unless it is shown that "the Plan's actuary made a significant error" in that process.

The congressional reports accompanying the bill that became MPPAA explain that the presumptions in subsection (B) were created "to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally 'correct

approaches.'" *Sen. Comm. on Labor and Human Resources, Section 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration*, 96th Cong., 2d Sess. 21 (1980) (*quoted in Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1137, 1143 n.7 (1st Cir. 1985)). Without these presumptions, Congress feared that plans might be "helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan." *Id. See also* H.R. Rep. 869, 96th Cong., 2d Sess., pt. 1, at 86 (1980). ("These rules are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination").

Here again, Congress chose not to dictate a "correct" choice of "assumptions and methods" but to permit trustees and their actuaries to choose from a range of reasonable alternatives, taking into account the particular experience of the plan. Implicit in this legislative choice is the recognition that, for example, actuaries who have knowledge of a plan's investment experience and investment options are better able to determine the investment return assumption than the drafters of federal legislation or reviewing courts or arbitrators. Without the presumption, courts and arbitrators would be placed in the position of making a *de novo* detemination of what assumption is "best" as to future investment returns. The Constitution does not compel Congress to place the courts and arbitrators in that position.

Moreover, here too, there are additional constraints on the determinations made by the plan and the plan actuaries. MPPAA requires trustees to adopt actuarial assumptions "which, in the aggregate, are reasonable . . . and which, in combination, offer the actuary's best esti-

mate of anticipated experience under the plan." 29 U.S.C. § 1393. Identical language appears in ERISA, 29 U.S.C. § 1082(c)(3), governing trustees' adoption of actuarial assumptions to be used in determining whether a plan has satisfied ERISA's minimum funding requirements. This scheme requires plan trustees to use a consistent set of actuarial assumptions for all purposes.[9] By so doing, MPPAA and ERISA significantly cabin the trustees' discretion:

> [T]he use of assumptions overly favorable to the fund in one context will tend to have off-setting unfavorable consequences in other contexts. For example, the use of assumptions (such as low interest rates) that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes would also make it more difficult for the plan to meet the minimum funding requirements of [ERISA]. [*United Retail & Wholesale Employees v. Yahn & McDonnell*, 787 F.2d 128, 146-47 (3d Cir. 1986) (Seitz, J., dissenting in part) *aff'd by an equally divided court*, 481 U.S. 735 (1987).]

B.

The second subsection of MPPAA which petitioner challenges, 29 U.S.C. § 1401(c), provides:

> In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

Congress determined that, in this context, arbitration is the preferred forum for making findings as to facts in dispute. As the District of Columbia Circuit stated in

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[9] H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 18 states: "The conferees intend that under this provision [section 1082(c)(3)] a single set of actuarial assumptions will be required for all purposes (e.g., for the minimum funding standard, reporting to the Department of Labor and to participants and beneficiaries, financial reporting to stockholders, etc.)".

I.A.M. National Pension Fund Benefit Plan C v. Stockton Tri Indus., supra, 727 F.2d at 1208 (footnote omitted):

> [In] establishing the arbitrative scheme, as in establishing an administrative agency, Congress has expressed a preference for initial resolution of the dispute in a non-judicial forum. . . . [A]n arbitrator skilled in pension and labor matters, like an agency in a given administrative area, is in theory likely to fashion superior resolutions of disputes within the arbitrator's area of expertise. [I]nitial resort to arbitration, like initial resort to an administrative tribunal, promotes judicial economy both because an arbitrator's decision may dispose of the dispute, and because even if one party appeals the arbitral decision, courts will have the benefit of the arbitrator's sifting of the facts. [*See also Chicago Truck Drivers Pension Fund v. L. Zahn Drug, supra*, 890 F.2d at 1410.]

Having decided that the facts should be determined in the arbitral process, Congress in § 1401(c) did no more than adopt a rule that courts should defer to the arbitrator's factual findings rather than engage in the fact-finding process on a *de novo* basis. In this context, that rule serves the legitimate objectives of the statute and in no way impinges on the right of a withdrawing employer to an impartial decisionmaker.[10]

---

[10] Petitioner may also intend to challenge the allocation of the burden of proof in the two subsections at issue. Suffice it to say here that the allocation of the burden of proof established in these provisions works with the presumptions discussed in text to further the interests already described that Congress sought to serve in creating the procedures governing withdrawal liability. And, as this Court has stated:

> Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application. . . . . However that may be, it is not for us to resolve the question of where the burden ought to lie on this issue. Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment. [*Lavine v. Milne*, 424 U.S. 577, 585 (1976).]

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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MOTION FILED
SEP 11 1992

(12)

No. 91-904

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF RESPONDENT

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---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF RESPONDENT

Central States, Southeast and Southwest Areas Pension Fund ("Central States") moves the Court for leave to file the attached brief as *amicus curiae* in support of respondent, Construction Laborers Pension Trust for Southern California. Central States urges that the United States Court of Appeals for the Ninth Circuit be affirmed. The reasons for this motion are as follows:

1. Central States Pension Fund is the largest multiemployer defined benefit pension plan in the country. The Pension Fund covers approximately 400,000 active participants and retirees.

2. Since 1980 approximately 1500 employers have withdrawn from Central States. Central States has assessed withdrawn employers for over $1 billion in withdrawal liability.

3. Several hundred withdrawn employers have invoked the dispute resolution procedures for withdrawn employers under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) to challenge their withdrawal liability assessments. *See*, 29 U.S.C. §§ 1399(a) and 1401.

4. Petitioners seek a constitutional ruling of such broad scope that it would, if rendered in their favor, eliminate or greatly curtail Central States' ability to collect withdrawal liability.

5. A ruling in favor of petitioners would encourage employer withdrawals and litigation in contravention of the stated policies of MPPAA and would greatly increase the costs to Central States and other multiemployer plans.

6. *Amici curiae*, Midwest Motor Express, *et al.* invite this Court to consider Central States as a reason for deciding this case in favor of petitioner. Amici present a highly distorted view of Central States to which Central States would respond.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF RESPONDENT

INTRODUCTION

Central States, Southeast and Southwest Areas Pension Fund is a multiemployer defined benefit pension trust fund established in 1955 by the Central Conference of Teamsters and the Southern Conference of Teamsters (affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America)

and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act (LMRA). The Pension Fund is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). The Pension Fund is administered for the exclusive benefit of the participants to whom the Trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States' pension plan (the "Plan").

Under the Plan and Trust Agreement participating employers contribute to the Pension Fund pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. In order for an employer and its union employees to participate in Central States, their collective bargaining agreement, including the contribution rates, must conform to the Trust Agreement and the Plan. The Pension Fund covers 164,000 retirees currently drawing benefits and 238,000 active participants of approximately 5,000 contributing employers.

The Central States Pension Fund is the largest multiemployer pension plan in the country. As of December 31, 1979 (the last year before the enactment of MPPAA), Central States had net assets of $2.4 billion and liabilities for vested benefits of $6.0 billion. As of December 31, 1991 its net assets exceeded $11.8 billion and the present value of liabilities for vested benefits approximated $13 billion. In that 12-year period, the Fund more than doubled its funding percentage so that by December 31, 1991 less than 14% of its vested benefit liability was unfunded, compared to almost 60% at December 31, 1979.

If an employer's obligation to contribute ceases, then coverage ceases for employees of the employer. Neither

employees nor retirees of the employer, however, lose their vested benefits under the Plan; and employees may continue to earn additional benefits by going to work for another contributing employer.

INTERESTS OF CENTRAL STATES

Petitioner challenges the constitutionality of certain provisions of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). Specifically petitioner asks the Court to strike down certain presumptions favoring pension plan determinations in MPPAA arbitrations between plans and employers. Petitioner also seeks to have the withdrawal liability provisions of the statute struck down "as applied" to it.

A. The Presumption

The presumption in favor of pension plans in arbitration is a burden of proof imposed on an employer. If the presumption is struck down, it is likely that employers will assert, and arbitrators may agree, that pension plans bear the burden of proving their assessments of withdrawal liability in every detail or lose the assessment. Central States currently has over 40 arbitrations pending. (This number has remained steady for several years as new cases are opened and old ones closed.) Central States would expect more, and more complex, arbitrations at great cost to Central States and all similarly situated multiemployer pension plans, and in derogation of the purposes of MPPAA. Central States supports respondent and the constitutionality of the statutory presumptions.

B. The "As Applied" Challenge

While petitioner asks only that the statute be struck down with respect to it alone, it is clear that the standard petitioner urges is broad. Virtually every employer who

is assessed withdrawal liability feels unfairly burdened. Central States fears an explosion of constitutional litigation as withdrawn employers seek constitutional equity on a case by case basis. That this fear is not idle is shown by the brief *amici curiae* of Midwest Motor Express, *et al.* which seeks to use Central States as an example of why they believe the statute is unconstitutional. Central States supports respondent and the constitutionality of the statute as applied to every employer.

SUMMARY OF ARGUMENT

This Court granted the writ of certiorari to consider whether the statutory imposition of withdrawal liability on petitioner Concrete Pipe and Products of California, Inc. (CP&P) under the Employee Retirement Income Security Act of 1974, as amended (ERISA), is unconstitutional for two reasons: whether the presumptions in favor of a multiemployer pension plan's assessment of liability against a withdrawn employer deprives the employer of procedural due process and whether statutory imposition of liability on the employer deprives it of substantive due process "as applied."

A. The Statutory Presumption Question

CP&P characterizes pension plan trustees as unrestrained and overreaching claimants whose goal is to assert the highest possible withdrawal liability claim against employers and to whom the statute grants a virtually irrebuttable presumption in favor of their unreasonable claims. The combination of bias and presumption, CP&P claims, makes the statute unconstitutional. The trustees are, however, probably less biased than the typical civil claimant. Unlike the typical claimant, the trustees operate under detailed statutory rules and agency regulations that must be followed strictly in calculating withdrawal liability. The trustees do not gain personally by exaggerating the claims. To be sure, trustees have a fiduciary duty to plan participants, but

that duty requires them to follow—not violate the statute. A presumption in favor of these trustees is thus actually less onerous than many presumptions in favor of individual claimants with a personal stake in the outcome that this Court has held constitutional. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed. 752 (1976).

Moreover the presumption is not irrebuttable. It is simply a burden of proof that applies only to trustee fact findings. The employer is entitled to make a record from which clear error, if it exists, may be determined. Legal determinations are, however, entitled to no presumption of correctness. Any claimant's bias would more likely be found in the legal calls trustees make—*e.g.*, the determination to pursue a claim for which the employer may have a defense. But arbitrators and courts have free reign under the statute to correct the bad calls of trustees. The presumptions are thus not unconstitutional.

B. The "As Applied" Question

CP&P claims that the statute is unconstitutional *as applied* to it under the particular facts and circumstances of this case—a seemingly narrow question. It is readily apparent, however, that CP&P's attack is not narrow. It seeks a rule from this Court that would in effect invalidate withdrawal liability in most (if not all) cases. This is a point not lost on *amici* Midwest Motor Express, Inc., *et al.*, who seek to generalize the discussion to apply to Central States, a non-party, upon the sketchiest and most misleading of records. In short CP&P and *amici* seek no less than to overturn this Court's rulings in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) and *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986).

Of course CP&P does not ask for outright overruling of those cases. It believes it has found a back door—

the "as applied" challenge. CP&P seeks nothing short of a right for it and every other withdrawn employer to have their cases weighed individually on a constitutional balance. By the facts it pleads it would have the Court tip that balance in a way that would allow virtually all employers to escape liability because the statute does not, and was not intended to, impose liability with mathematical precision to account for an employer's own employees' earned benefits. Quite to the contrary, the statute recognizes that much pension plan liability is unattributable to any now existing contributor, but that someone has to pay it—contributors or participant employees (through lost benefits)—and Congress chose the contributors. That choice is not unconstitutional. These plans are insurance vehicles for both employers and employees. CP&P knew this when it voluntarily agreed to participate in the plan. It is impossible to say whether CP&P's employees earned as much in benefits as CP&P paid into the plan, but C&P's bargain with the plan makes that irrelevant.

If the question is narrowed to the "as applied" facts of this case, the attack is yet even more invidious. It suggests that a law that is generally constitutional may not be constitutional in specific cases, which turn on the court-determined degree of the burdens placed on the employer. If CP&P is correct, then Congress may legislate generally, but the courts will adjust the statute according to the equities of each case: in short "constitutional equity." This is substantive due process beyond even the now-rejected reach of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). And the concept of an unconstitutional taking "as applied" defies comprehension. Under *R.A. Gray* and *Connolly* the statutes is constitutional "as applied" to CP&P.

ARGUMENT

I. THE STATUTORY PRESUMPTIONS ARE SIMPLY A REBUTTABLE BURDEN OF PROOF THAT COMPORT FULLY WITH DUE PROCESS

Central States has surveyed all of its MPPAA arbitrations for which there are written awards to examine whether and in what way arbitrators have employed the presumptions of 29 U.S.C. § 1401(a)(3). There are 32 cases of which employers have won 10 and Central States has won 23 (one case is counted twice because each party won a significant issue).

Of those 10 cases won by employers, the presumptions were acknowledged in 5 and the employer met its burden. Two of these are published.[1] (The other 5 involved, for the most part, legal questions for which the presumptions do not apply.) In those 23 cases won by Central States, the presumptions were acknowledged eight times, but were only clearly applied three times. Five of these eight decisions (including all three where the presumption was applied) are published.[2]

What is striking about these cases is the small degree to which the presumptions play any roll. Especially significant to this case is the apparent fact that in practice these presumptions are applied by arbitrators as a simple burden of proof. In none of these arbitrations—indeed in no MPPAA arbitration known to Central States—is there

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[1] *Carnation Co. and Central States Pension Fund*, 9 Employee Benefit Cases (BNA) (hereinafter "EBC") 1409 (Am. Arb. Assn. ("AAA") 1988); *Oolite Industries, Inc. and Central States Pension Fund*, 8 EBC 2009 (AAA 1987).

[2] *Bronough Motor Express and Central States Pension Fund*, 6 EBC 2137 (AAA 1985); *Cullum Cos. and Central States Pension Fund*, 10 EBC 1926 (AAA 1988); *Don Hutson, Inc. and Central States Pension Fund*, 8 EBC 2319 (AAA 1987); *Loomis Armored, Inc. and Central States Pension Fund*, 8 EBC 1899 (AAA 1987); *Marvin Hayes Lines, Inc. and Central States Pension Fund*, 8 EBC 1845 (AAA 1987).

the slightest evidence of an arbitrator, hobbled by these presumptions, simply deferring to pension plan determinations in the face of substantial employer evidence.[3]

For example, in *Bronough Motor Express and Central States*, 6 EBC 2137 (AAA 1985) the arbitrator repeatedly referred to the paucity of the employer's evidence. Notwithstanding the presumptions it is clear from the arbitrator's conclusions that he applied a simple preponderance of the evidence standard and that the employer not only failed that burden, but any burden.

> As stated above, MPPAA provides that the determination made by the Fund's Trustees must be shown by a preponderance of the evidence to be unreasonable or clearly erroneous in order for the contesting party to prevail. This record simply does not, by a preponderance of evidence, establish that the Fund's Trustees' determination was unreasonable or clearly erroneous. The record clearly reveals the Company was given ample opportunity to provide necessary proof to the Fund. It was unable to demonstrate a duty or obligation to continue contributions to the Fund. The record fully supports the determination of the Trustees. Finding no evidence of a continuing obligation to contribute, the Trustees had no alternative and properly held a complete withdrawal had occurred.

Id. at 2142.

Another arbitrator, confronted with questions regarding the constitutionality of the presumptions, determined to bypass them entirely yet still used a preponderance of the evidence standard.

> However, the constitutionality of Sec 4221(a) is in this case immaterial. Without reference to the presumption in favor of Fund's determination, I have judged whether a preponderance of the evidence establishes whether the Fund's determination was reasonable or unreasonable.

Loomis Armored, Inc. and Central States Pension Fund, 8 EBC 1899, 1906 (AAA 1987). With and without the presumption the *Bronough* and *Loomis* arbitrators used the same standard.

A third arbitrator, confronted with the same constitutional questions, determined that the weight of authority required him to follow the presumptions. Yet the standard used by him is an even weaker burden on the employer than used by the *Loomis* arbitrator.

> Although the Supreme Court's 4 to 4 vote in *Yahn & McDonnell* certainly places considerable uncertainty on the ultimate fate of the statutory presumptions, it is undisputed that the Supreme Court's action in that case has no precedential value. Accordingly, I believe I am obliged to follow the present weight of appellate authority which, as noted above, has upheld the presumptions' constitutionality.
>
> However, I do follow the Fund's suggestion that the presumptions be given only the limited role which the Pension Benefit Guaranty Corporation recommended to the Supreme Court in *Yahn & McDonnell*. There the PBGC suggested that § 4221(a)(3) be construed as simply placing on the employer the burden of going forward and of persuasion, and such approach has since been adopted by the court in *Banner Industries v. Central States, Southeast and Southwest Areas Pension Fund*, 86 C 3046 (N.D. Ill. Sept. 23, 1987). I can also state that the presumptions as thus construed have not affected in any material respect my determinations with respect to any of the issues herein.

Carnation Co. and Central States Pension Fund, 9 EBC 1409, 1418 (AAA 1988). In an accompanying footnote the arbitrator noted that his approach was consistent

[3] A list of the Central States arbitration decisions is included in the appendix, including citations of published decisions. Most of these decisions detail the parties' positions, but almost nowhere do we find evidence of employer accusing trustees of bias. *But see Carnation*, 9 EBC at 1409.

with the discussion in *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984). The arbitrator found that the employer met its burden and ruled against the Fund.

Others arbitrators, while acknowledging the presumptions, have implicitly set them aside and gone about their business of deciding who is right and who is wrong.

> To the contrary, the arbitrator's sole function is to review the correctness of a plan's withdrawal liability determinations under sections 4201 through 4219 of ERISA, and those determinations may be overturned only if they are "unreasonable or clearly erroneous." ERISA section 4221(a)(1) and (a)(3). If the plan's determinations are correct, they must be enforced; if incorrect, they must be modified to conform to the statute.

Don Hutson, Inc. and Central States Pension Fund, 8 EBC 2319, 2327 (AAA 1987).

One of the few arbitrators to grapple with the specific language of the presumptions analyzed them as follows:

> In order to prevail, the party contesting the plan sponsor's determination must (A) prove to the arbitrator, definitely and firmly, on the basis of the entire evidence, that mistake has been committed, or (B) convince the arbitrator that the determination is against controlling law or is unsupported by a coherent legal argument. 7 EBC 2572. In the matter before me, the Company has convinced me that the Fund's determination is against controlling law; specifically, it is not in accordance with the Plan document.

Oolite Industries, Inc. and Central States Pension Fund, 8 EBC 2009, 2019 (AAA 1987). To this arbitrator the employer's burden was perhaps a bit heavier but did not rise to constitutional dimension. Indeed, in that case Central States tried to explain the meaning of words adopted

by its own trustees in the plan and lost. If this were trustee bias, then the presumption certainly did not aid it.

Actually trustee bias is most notable for its absence in these arbitration cases. If it were present one would expect the employer to make it a centerpiece of its case. In only one case was trustee bias strongly argued by the employer. The arbitrator rejected it as follows:

> I have not adopted Carnation's further contention that the type of trustee bias cited by the Third Circuit in *Yahn & McDonnell* has actually been demonstrated in the present case. It is true that the Central States staff did strongly importune Mr. McGinn to reexamine his originally presented UVB figure, and that his new UVB figure was responsive to their objections. However, I am unable to conclude that Messrs. Trojak and Frawley, both of whom testified at the hearing, were prompted by other than their own sincere reservations regarding McGinn's original figure.

Carnation, 9 EBC at 1418. What the employer had thought was bias turned out to have been a diligent staff recognizing an actuary's error and taking steps to have it corrected.

These arbitration decisions seem to be representative of MPPAA arbitrations generally.[4] If they are special in any way it is that they mention the presumptions at all. Only 13 of the 32 Central States cases referred to the presumptions. What is clear from the MPPAA arbitration universe, however, is that arbitrators, whether ruling for employers or plans, regard the presumptions as just a burden of proof to be borne by the employer. In fact if we imagine a statute that had no presumptions, but required the employer initiate arbitration to make its

[4] This is not really surprising since the arbitrators are selected from a national list maintained by AAA, have probably handled a number of these cases, and certainly are aware of each others' decisions.

case (as MPPAA does), it is hard to imagine how these cases might have been differently decided.

What is obvious from examining these and any other MPPAA arbitrations is that the horribles advanced by CP&P (the same as imagined by the Third Circuit in *Yahn & McDonnell*) have not come to pass. The reason is twofold. First, the trustees have no inherent bias. Second, even if trustees were to make a biased decision, the presumption would not shield it from effective review. The D.C. Circuit got it completely right.

> Although the initial determination of the amount of withdrawal liability is made by the plan trustees who are under a fiduciary duty to act solely in the interest of the plan's participants and beneficiaries, *see* 29 U.S.C. § 1104(a)(1) (1976 & Supp. V. 1981); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981), the trustees have no inherent bias or duty to maximize the employer's withdrawal liability . . . . We conclude that the trustees' fiduciary duties require them to act neutrally and reasonably in making withdrawal liability determinations. Furthermore, we interpret the presumptions under the MPPAA, in favor of a plan's withdrawal liability assessments, not to insulate the trustees' determinations from effective review, but rather to require the trustees affirmatively to provide some support for the reasonableness of their determinations in the event that the employer introduces evidence to the contrary.

Washington Star, 729 F.2d at 1511.

But what if the trustee bias were hidden? Could the arbitrator unknowingly participate in the bias by applying even a weak presumption? If the bias were in concocting false "facts," then it would seem that the employer should be able to show the correct facts just as in any trial. If after hearing the evidence the arbitrator determines the case is in equipoise, then the employer has failed to prove its case and ought to lose as it would in a

non-MPPAA trial. And if the "bias" were in the way the trustees interpret the statute—choosing for example, as fiduciaries, to press a case whose legal outcome is uncertain—that is no more than any claimant's right. Moreover such determinations are legal in nature, not factual, so are not even subject to the presumptions.

Of course this Court might determine that five circuits and innumerable arbitrators have erred—that rather than applying the presumptions as written, they have put on a judicial gloss that softens their impact. This does not appear to be the case, but if it were, then maybe later courts and arbitrators might be less generous and all the horribles imagined by CP&P might come to pass. Should this Court preemptively strike down the statute? Not in this case.

If all of this seems highly speculative, it certainly is. The problem with the instant case is that it does not present a clear example of the presumption being applied in an unconstitutional manner. If this Court is uncertain, it should not rule preemptively, but should await a case that actually shows the MPPAA procedures in failure. This is not such a case, and it is highly unlikely one will come along, but if it does, the Court may then act.

An even better alternative of course would be to adopt the reasoning of the D.C. Circuit. That would preempt the possibility of future rogue arbitrators deciding the presumptions mean much more than heretofore thought.

The above analysis begs a final question. If the presumptions are so benign as to barely alter (if at all) the burden that would in their absence attach to the employer claimant in arbitration, then why would Central States or other plans care if this Court struck them down. The answer lies in the expectations of employers like CP&P. If the presumptions are struck down, we can safely assume that employers will argue that pension plans bear the burden of proving their assessments of

withdrawal liability in every detail. Should Central States have to prove that its actuarial tables are better than all others? And if it is impossible to say which actuarial table is the "correct" table, has Central States failed in its burden? Even if all acknowledge that Central States has some level of unfunded vested benefits, must it be barred from collecting withdrawal liability because actuarial science is imprecise? This is the ultimate hope of employers like CP&P. This Court should not leave that door open.

The statutory presumptions quiet, as they were intended to, such fruitless litigation. Accordingly this Court should affirm the constitutionality of the presumptions. But if the Court should strike them down, it should clarify that the usual claimant's burden of proof continues to rest with the employer.

II. THE CONSTITUTIONALITY OF STATUTES UNDER THE FIFTH AMENDMENT RESTS ON THEIR GENERAL APPLICATION; INDIVIDUAL COMPANIES LIKE CP&P ARE NOT ENTITLED TO COURT-PROVIDED SPECIAL EXEMPTIONS ON THE GROUNDS OF CONSTITUTIONAL EQUITY.

CP&P opens its argument with the unsupported and demonstrably false statement that "Congress adopted MPPAA with the goal of charging the cost of funding benefits promised to a withdrawing employer's employees to that employer at the time of withdrawal." CP&P brief at 19. Congress, CP&P implies, ineptly failed to achieve that goal when it allocated liability by contribution share rather than by attributable liability. *Id.* at 26. Thus, CP&P concludes, employers like it whose liability greatly exceeds the value (zero, it claims) of benefits owed to its employees are entitled to constitutional relief. CP&P is wrong on all counts.

Congress was well aware that multiemployer pension plans have accumulated large liabilities for participants and retirees which are not attributable to any presently

contributing employer. A major reason for MPPAA was to prevent further accumulation and to insure existing benefits are funded. These trusts are, under § 302(c)(5) of the Labor Management Relations Act, pooled trusts for which contributions are made for the benefit of all participants—not just an employer's own employees. And benefits are payable to any eligible participant from the pool regardless of the employer's actual contribution history. Thus, an employer's contributions are determined on fund-wide needs and not on the actuarial characteristics of the employer's employees. Contributing employers share equally in paying for all benefits under the plan by paying a level contribution rate. In this respect the plans are like life insurance group annuities. Some participants will draw more benefits than contributions made on their behalf and others will draw less. Some employers will pay more in contributions than their employees receive in benefits and others will pay less.

In enacting MPPAA Congress well understood this insurance aspect of these plans.

> Multiemployer plans are also characterized by a "self-insurance" feature which enables a plan participant to retain benefit credits earned for service with a contributing employer even though the employer subsequently ceases contributing to the plan. A contributor's obligation to continue to fund the benefit obligations of a multiemployer plan normally ceases upon the contributor's withdrawal from the plan, whether a result of the cessation of the contributor's covered operations or the termination of the collective bargaining relationship. Thus contributors who remain in the plan and newly entering contributors have the burden of funding the unfunded benefit obligations for employees of a withdrawn employer.

H.R. Report 96-869 Part I, Committee on Education and Labor, 96th Congress, 2d Sess. (April 2, 1980) at p. 53. When Congress enacted MPPAA many of these liabilities had already been left behind and payment was shared by all contributors. So when Congress imposed with-

drawal liability on newly withdrawing employers for "their fair share of the plan's unfunded benefit obligations," *id.*, it was clear that withdrawn employers would be paying more than just for their own employees just as they had in contributions before they withdrew. The employer's share of contributions to the fund establishes under 29 U.S.C. § 1391 the proportion by which fund liabilities are allocated to it after it withdraws. The employer's pre-withdrawal share of total plan liabilities therefore can no longer be dumped by the employer, but, under MPPAA, must be paid as withdrawal liability after the withdrawal.

The second flaw in CP&P's reasoning is its belief that its employees earned no benefits under the plan. CP&P has ignored the second major feature of multiemployer plans.

> Multiemployer plans have historically provided a high degree of benefit security to plan participants because of the features of "pension portability" and self-insurance" which characterize such plans. Pension portability under a multiemployer plan means that a participant's benefit is based on service with all contributing employers for whom the participant has worked. This enables a participant who moves from one contributing employer to another, who might otherwise not be eligible for benefits based on service with any one employer, to receive a pension if his or her total service with all the contributing employers is sufficient to satisfy the plan's requirements for a vested benefit.

H.R. Report 96-869 Part I, *supra*, at p. 53 . It is probable that some, perhaps many, of CP&P's employees earned benefits: some may have vested while employed by another employer and then have earned additional vested benefits with CP&P; some may have some prior service credit with earlier employers and then became vested while working for CP&P; and some may have vested while working for later employers based in part on prior

service with CP&P. The fact that CP&P contributed for fewer than 10 years is thus largely irrelevant to the value of benefits earned by its employees.[5] It is their total service under the plan with CP&P and others that determine plan liabilities.

CP&P is thus entirely wrong in its premise. MPPAA liability, it turns out, is rationally related to the ends sought by Congress even as it is applied to CP&P.

But suppose CP&P were right and its employees earned no benefits. Should it follow, under the Constitution, that CP&P must pay no liability? In CP&P's view, yes. Either Congress must tailor its statutes to the unique circumstance of each regulated individual, or the courts must step in under constitutional authority to block the statute's burdens where "undue."

In asking this Court to rule that MPPAA violates substantive due process "as applied" to it, CP&P really asks this Court to add a new dimension to constitutional analysis. The test has heretofore been whether the challenged statute bears a rational relationship to a valid state interest. See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974). This Court has never held that there is an "as applied" dimension to this test that extends it to each affected entity individually.

CP&P seems to concede that the statute meets the aggregate test (see *R.A. Gray*), albeit reluctantly. Under the claimed "as applied" dimension, however, the statute's applicability to certain employers would be constitutionally invalid. Congress may shift benefits and burdens of economic life generally, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed. 752 (1976),

[5] And under the insurance principle of these plans it is irrelevant whether they actually earned any benefits—they might have. CP&P left the plan after only a few years, but it might have stayed for many. This was CP&P's insurance as well as its employee's. Having bought insurance but having no claim, CP&P cannot now have its premium back.

but CP&P claims it may not raise the burden too high in any case. The law will thus apply to some but not others in the sole discretion of the courts.

This Court should reject "as applied" substantive due process as an invidious invitation to the courts to fine tune legislation. Such fine tuning of individual cases would severely undercut congressional authority and would result in uneven application of the laws. Central States has argued to this Court in another case that Congress' power to legislate individually is restrained by the constitutional requirement of public purpose. See *Central States v. Lady Baltimore Foods, No.* 92-150 (pet. for cert. filed June 30, 1992). Here CP&P argues by implication that Congress *must* legislate with the specific individual in mind (as it did in *Lady Baltimore*) or risk the courts' intervention on constitutional grounds. This argument rejects public purpose altogether in favor of individual equity. Such a pernicious suggestion should be rejected out of hand.[6]

What we see in CP&P's argument is the last vestige of the long-discredited notion that multiemployer plans are really "individual account" plans for each employer. See *Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729 (9th Cir. 1978). If an employer's liabilities are constitutionally limited to the value of its employees' benefits, then in effect the plan is an aggregate of single-employer plans under a common administration. Some employers (CP&P thinks it is one) would be winners if liabilities were so limited, but it would necessarily be more costly to others—particularly continuing contributors that must fund unattributable liabilities. And as more employers

[6] Perhaps CP&P's real argument ought to be under equal protection. On what rational basis did Congress decide *Lady Baltimore*, a highly solvent corporation whose employees admittedly earned benefits under Central States, deserved an exemption while CP&U did not? This underscores why Congress was wrong to exempt *Lady Baltimore*. Are the courts better equipped to provide exemptions for employers like CP&P?

take advantage, the ultimate losers are the plan participants (especially retirees) who are not attributable to any contributor. This adverse selection thoroughly undercuts the insurance principles upon which these plans are founded, and would destabilize and threaten the continuing viability of these plans.[7]

ERISA and MPPAA policies are reasonably applied in the aggregate by these statutes. CP&P is entitled to no special consideration. Indeed special consideration would itself violate the guiding principles of due process—even application of the laws. This court should affirm the judgment of the court below.

CONCLUSION

The presumption in favor of the correctness of a pension plan's factual determinations is a constitutional allocation of the burden of proof. The statutory imposition of liability to withdrawn employers is constitutional in its general application, and there is no constitutional requirement that statutes be tailored to prevent "undue" harshness in individual cases.

Respectfully submitted,

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September 11, 1992

[7] A similar assault on these plans through adverse selection can be seen in *Local 144 Nursing Home Pension Fund v. Demisay*, No. 91-610 (currently being briefed before this Court). In both cases the employers' principal motive is to insulate themselves from liabilities attributable to employees of other employers in contravention of insurance principle foundation of these plans.

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(13)

No. 91-904

Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

IN THE

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OCTOBER TERM, 1992

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Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

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BRIEF FOR THE TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA & VICINITY AND THE DAIRY INDUSTRY-UNION PENSION FUND OF PHILADELPHIA & VICINITY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF THE AMICI CURIAE

This brief, which urges the Court to affirm the decision below, is submitted on behalf of two multiemployer pension plans. The Teamsters Pension Trust Fund of Philadelphia & Vicinity ("Vicinity Fund") has approximately 30,000 participants who work for about 950 companies. The vast majority of the Vicinity Fund's participants

live in Pennsylvania, New Jersey, and Delaware. The Dairy Industry-Union Pension Plan of Philadelphia & Vicinity ("Dairy Plan") has approximately 3,300 participants employed by about twenty companies in that same area.

The Vicinity Fund and Dairy Plan have a special interest in this case, as they are both located within the jurisdiction of the United States Court of Appeals for the Third Circuit. An employer which seeks to challenge an assessment of withdrawal liability must do so by invoking arbitration under § 4221(a) of the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1401(a) ("MPPAA"). Ever since the decision in *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell*, 787 F.2d 128, 135-44 (3d Cir. 1986), *aff'd*, 481 U.S. 735 (1987) (equally divided Court), multiemployer plans governed by the Third Circuit have been denied the evidentiary presumptions in arbitration guaranteed to them by MPPAA § 4221(a).[1]

[1] Section 4221(a), 29 U.S.C. § 1401(a), provides, in relevant part, that:

> (3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 [29 U.S.C. § 1381] through 4219 [29 U.S.C. § 1399] of this title and section 4205 [29 U.S.C. § 1405] of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.
>
> (B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—
>
> > (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
> >
> > (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

The petitioner in this case has, in effect, urged the Court to adopt the Third Circuit's position in *Yahn & McDonnell* (Petitioner's Brief at 24). Because any continuing vitality of *Yahn & McDonnell* threatens multiemployer plans with serious and adverse consequences, the *amici* herein request the Court to reject the Third Circuit rule.

Both the Vicinity Fund and Dairy Plan have been involved in withdrawal liability litigation for many years.[2] A variety of major cases presently in progress could be greatly affected by this Court's decision.

The Dairy Plan, for example, has asserted a claim for in excess of $10,000,000 in a case captioned *American Financial Corporation and Dairy Industry-Union Pension Fund for Philadelphia & Vicinity*, Case No. 146200005855.

[2] The Vicinity Fund currently have about ninety-three active withdrawal liability claims. The following list of opinions represents only a fraction of the actual court cases and arbitrations in which the Vicinity Fund has been involved: *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988); *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 830 F.2d 1241 (3d Cir. 1987); *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 787 F.2d 897 (3d Cir. 1986); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Fuqua Industries, Inc.*, No. 90-6872, 1992 W.L. 70418 (E.D. Pa. 1992); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Custom Cartage Co.*, No. 89-0626, 1991 W.L. 160966 (E.D. Pa.), *aff'd*, 961 F.2d 1568 (3d Cir. 1992); *In re Cardon Realty Corp.*, 124 B.R. 630 (W.D.N.Y. 1991); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Laidlaw Industries, Inc.*, 745 F. Supp. 1016 (D. Del. 1990); *Philadelphia Journal, Inc. v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, No. 87-7637, 1989 W.L. 45865 (E.D. Pa.), *aff'd*, 891 F.2d 282 (3d Cir. 1989); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Malone Realty Co.*, 82 B.R. 346 (E.D. Pa. 1988); *In re Malone*, 74 B.R. 315 (E.D. Pa. 1987); and *Fox v. ABC Air Freight, Inc.*, Nos. 84-3698, 3934 & 4982, 1986 W.L. 14538 (E.D. Pa. 1986).

The Dairy Fund has also been involved in MPPAA arbitration. *Tuscan Milk Co. and Dairy Industry Union Pension Plan for Philadelphia & Vicinity*, 9 E.B.C. (BNA) 1618 (Kasher, Arb. 1988).

One of the principle issues in *American Financial* is whether American Financial sold one of its divisions that contributed to the Dairy Plan in order to avoid or evade withdrawal liability in violation of MPPAA § 4212(c), 29 U.S.C. § 1392(c). The facts surrounding that issue, which focus upon the corporate decisions, motivations, and transactions that led up to the divestiture, are obviously within the possession of the withdrawing employer. Some of the most crucial evidence is exclusively within the control of the employer. Under such circumstances, the Dairy Plan is faced with great obstacles in obtaining evidence through discovery, principally of hostile witnesses, and of not having witnesses of its own to the decisions, motivations, and transactions. As shall be illustrated herein, traditional rules of evidence—which have always been found consistent with the dictates of due process—permit the employer to bear the burden of proof on that issue. *See, infra*, n.10 and accompanying text. However, a strict reading of *Yahn & McDonnell* could deny the Dairy Plan the presumptions guaranteed to it by Congress and by common law principles.

Similarly, a claim which the Vicinity Fund has brought for approximately $2,100,000 against a corporate parent that divested itself of a subsidiary in order to avoid and evade withdrawal liability is presently in arbitration. *See Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 830 F.2d 1241, 1252-1255 (3d Cir. 1987) (remanding this issue to arbitration). The outcome of the case at bar obviously could have a substantial impact upon that claim. Many other actions involving the Vicinity Fund will be affected by the outcome of the present case.

In view of the significance of the MPPAA § 4221(a) presumptions, the Dairy Plan and Vicinity Fund submit this brief to the Court. For the reasons stated below, the decision of the Ninth Circuit should be affirmed and the holding of the Third Circuit should be rejected.

SUMMARY OF ARGUMENT

The real procedural due process issue before the Court is whether Congress has the power to assign the burden of proof to the withdrawing employer in a MPPAA arbitration. This question is easily answered in the affirmative for two reasons.

First, under the precedents of this Court, the Due Process Clause could not conceivably interfere with a burden of proof in civil litigation which involves mere monetary relief. An historical review, with emphasis upon the law in effect at the enactment of the Fifth Amendment, reveals a willingness on the part of courts to shift the burden of proof in order to reflect social policy. Nothing in the Due Process Clause suggests an intention to interfere with the type of presumptions set forth in MPPAA § 4221(a). This Court, moreover, has sustained the shifting of the burden of proof to defendants in such a wide variety of criminal and civil precedents that a due process challenge to MPPAA § 4221(a) has no constitutional mooring.

Second, and alternatively, this Court has recognized that Congress has plenary power to provide for the manner in which rights created by Congress are adjudicated. This power includes the prerogative to create presumptions and to assign burdens of proof. The presumption and burdens of proof codified in MPPAA § 4221(a) constitute a valid exercise of that power.

Apart from these considerations, the *amici* herein note that a decision by this Court upsetting MPPAA § 4221(a) could cause chaos for many types of litigation. The burdens of proof established by MPPAA are as constitutionally sound as those sustained by this Court in tax, expatriation, prison, and employee benefits cases. The constitutionality of the settled burdens of proof in these areas (as well as many common law presumptions) could be thrown into doubt if this Court were to endorse the Third Circuit's position in *Yahn & McDonnell*.

ARGUMENT

I. THE REAL PROCEDURAL DUE PROCESS ISSUE IN THIS CASE IS NOT WHETHER A WITHDRAWING EMPLOYER IS DENIED AN UNBIASED ADJUDICATOR, BUT WHETHER CONGRESS CAN PLACE THE BURDEN OF PROOF UPON AN EMPLOYER IN CHALLENGING A WITHDRAWAL LIABILITY ASSESSMENT.

According to the petitioner, MPPAA denies a withdrawing employer the constitutional right to an impartial adjudicator because the fiduciaries of the plan (collectively known as the "plan sponsor") are biased by an incentive to maximize the collection of withdrawal liability (Petitioner's Brief at 40-50). The Third Circuit essentially adopted this position in *Yahn & McDonnell*, 787 F.2d at 138-42. The underlying premise of the petitioner's argument is that the plan sponsor's "decision in computing, assessing and collecting withdrawal liability is *adjudicative* in nature." (Petitioner's Brief at 46, emphasis added). If this assumption is incorrect, then the petitioner's due process argument collapses for failure to establish a link between the plan sponsor's alleged "bias" and an adjudicative act. A review of MPPAA reveals that the plan sponsor's role is not even vaguely "adjudicative."

The statute specifically states that "[a]ny dispute between an employer and the plan sponsor concerning withdrawal liability is to be resolved by arbitration," MPPAA § 4221(a)(1), 29 U.S.C. § 1401(a)(1), and provides for subsequent judicial review, MPPAA § 4221(b)(2), 29 U.S. § 1401(b)(2). Arbitration, not the MPPAA assessment procedure, is the initial adjudication. There is no question that arbitration and judicial review provide withdrawing employers with unbiased decision makers. Therefore, the purported bias of the plan sponsor is not at issue.

This point is illustrated by *Marshall v. Jerrico, Inc.*, 446 U.S. at 238 (1980), which involved a challenge to a similar dispute resolution mechanism contained within the child labor laws. The statutory scheme in *Jerrico* authorized the United States Department of Labor ("DOL") to make the initial determination of civil liability for statutory violations. An employer could challenge such an assessment, initially by invoking the right to a hearing before an administrative law judge, and subsequently by seeking judicial review. The *Jerrico* plaintiff challenged the constitutionality of this scheme by charging that the DOL was: (1) the trier of fact in the first instance, and (2) biased because it stood to benefit from maximizing the collection of civil penalties. On this basis, the employer maintained that the DOL did not constitute a neutral adjudicator.

This Court disagreed, reasoning that the initial determination by the DOL was not a "judicial or quasi-judicial" function. Writing for the *Jerrico* Court, Justice Marshall explained that the "function of assessing a violation is akin to that of a prosecutor or civil plaintiff." *Id.* at 247. Because the statutory procedures provided for administrative and judicial review of the assessment by unbiased adjudicators, the due process challenge failed.

This case falls within the logic of *Jerrico*. The plan sponsor's actions in "assessing, calculating, and collecting" withdrawal liability are no more "judicial" in nature than the activities of the DOL in assessing, calculating, and collecting penalties under the child labor laws. The real *adjudication* occurs later, in arbitration which, if necessary, is followed by judicial review.

The only tangible distinction between the MPPAA statutory procedure presently under challenge and that upheld in *Jerrico* involves the *burden of proof*. In *Jerrico*, the administrative law judge exercised *de novo* review of the DOL's assessment whereas, under MPPAA § 4221(a)(3), 29 U.S.C. § 1401(a)(3), the employer has the burden of proof in overturning a withdrawal liability assessment. The constitutional validity of the apportionment of the

burden of proof is the real procedural due process issue before the Court.

In a sense, the Third Circuit's decision in *Yahn & McDonnell* highlights the extent to which this case turns on the burden of proof, rather than on the alleged bias of the adjudicator. The Third Circuit *did not* invalidate those portions of MPPAA which require the plan sponsor to assess, to calculate, and to collect withdrawal liability. Rather, *Yahn & McDonnell* simply severed the presumptions in favor of the plan sponsor from the statute.[3] Perhaps even more significantly, the Third Circuit stated the following with respect to the MPPAA procedure:

> The provision placing the initial determination in the hands of the trustees [*i.e.*, the plan sponsor] represents, in part, Congress' effort to capitalize on the expertise of persons experienced in and devoted to the pension fund process. Striking down only that provision would require deciding who should replace the trustees in *making the initial assessment* of liability—a matter not appropriate for judicial determination.

787 F.2d at 142 (emphasis added).

Thus, even the Third Circuit concedes that the MPPAA collection procedure involves the "initial assessment" of withdrawal liability. *Jerrico* teaches that such an "initial assessment" *is not* a judicial or quasi-judicial act. The only real procedural due process issue for this Court is whether the employer can be required to bear the burden of proof during the adjudication. Once the issue is properly characterized, the Third Circuit rule collapses.

---

[3] Petitioner seeks basically the same relief from this Court (Petitioner's Brief at 48).

II. THE CONGRESSIONAL DECISION TO PLACE THE BURDEN OF PROOF UPON THE WITHDRAWING EMPLOYER IN MPPAA ARBITRATIONS FULLY COMPORTS WITH THE REQUIREMENTS OF DUE PROCESS.

Nothing in the Due Process Clause of the Fifth Amendment prevents Congress from apportioning the burden of proof in the manner set forth in MPPAA § 4221(a). This Court's precedents demonstrate two principles, either of which suffices to sustain the statutory presumptions. *First*, the Due Process Clause has never interfered with the apportionment of the burden of proof in civil litigation of this nature, which solely involves monetary relief. *Second*, Congress has the plenary power to create presumptions and to assign burdens of proof concerning rights created by federal legislation, such as MPPAA.

A. The Due Process Clause of the Fifth Amendment Does Not Implicate The Burdens of Proof Established by MPPAA.

The strongest point which can be made in support of the petitioner's due process argument is that a withdrawing employer is the rough equivalent of a defendant in civil litigation. It is true that the defendant usually bears the burden of proof in such cases. However, the general practice has so many well-established exceptions that any attempt to codify the plaintiff's burden of proof in the Due Process Clause of the Fifth Amendment can only be described as ludicrous. Indeed, this Court has even sanctioned shifting of the burden of proof in *criminal* cases.

Patterson v. New York, 432 U.S. 197 (1977) is the seminal precedent for determining whether the allocation of a burden of proof violates procedural due process. The case involved the constitutionality of a New York homicide statute which enabled the defendant in a murder trial to raise the affirmative defense of diminished capacity. The statute provided that a jury should return a conviction of manslaughter, rather than murder, if it

found that the victim had been killed while the defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." The statute, moreover, provided that in litigating this issue, the defendant bore the burden of proof "by a preponderance of the evidence." *Id.* at 198-201.

The *Patterson* defendant, who had been convicted of murder after unsuccessfully arguing diminished capacity, contended that his right to due process had been violated by requiring him to bear the burden of proof. This Court affirmed the conviction on the following basis:

> In determining whether New York's allocation to the defendant of proving the mitigating circumstances of severe emotional disturbance is consistent with due process, it is . . . relevant to note that this defense is a considerably expanded version of the common-law defense of heat of passion on sudden provocation and that at common law the burden of proving the latter, as well as other defenses—indeed, "all . . . circumstances of justification, excuse or alleviation" —rested on the defendant. 4 W. Blackstone, Commentaries *201; M. Foster, Crown Law 255 (1762) . . . *This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified. Commonwealth v. York*, 50 Mass. 93 (1845).

Id. at 202 (emphasis added, footnotes omitted).

In short, *Patterson* stands for the proposition that the burden of proof that was generally accepted at the time that the Due Process Clause was added to the Constitution passes constitutional muster. The reason for the principle is understandable. Barring evidence to the contrary, the Framers of the Bill of Rights are not likely to have intended to outlaw a judicial practice which was universally accepted in their day.

Significantly, the position of the *Patterson* defendant was much stronger from a procedural due process viewpoint than that of the petitioner in this case. *Patterson* involved a criminal prosecution in which procedural safeguards receive the highest degree of protection under the law. The *Patterson* Court, nonetheless, upheld the burden of proof placed upon the defendant, explaining that "[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interest against those of the accused *have been left to the legislative branch.*" *Id.* at 210 (emphasis added). A similar result is even more appropriate in this case, which involves a purely monetary dispute concerning the method in which Congress determined to apportion pension liability.[4]

Application of the historical analysis demonstrated by *Patterson* to the burdens of proof set forth in MPPAA demonstrates the total absence of any constitutional infirmity. The common law principles contemporaneous with the Due Process Clause of the Fifth Amendment discredit any suggestion that Congress could not apportion the burden of proof to a withdrawing employer under MPPAA.[5]

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[4] This Court has upheld other burdens of proof upon the accused in criminal cases. *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (upholding requirement that a defendant in a criminal case bear the burden of proof on self-defense); *Leland v. Oregon*, 343 U.S. 790, 798-99 (1952) (requiring *defendant* in criminal case to bear the burden of proof "beyond a reasonable doubt" on insanity defense); *Morrison v. California*, 291 U.S. 82, 85-90 (1934).

[5] In another sense, the petitioner herein has a weaker position than the *Patterson* defendant as this case involves a challenge to a federal statute. The historical inquiry, therefore, should focus upon the enactment of the Fifth Amendment in 1791, rather than that of the Fourteenth Amendment, adopted in 1866, which governs state statutes.

This point, however, is not essential to the outcome of this case. MPPAA § 4221(a) passes muster regardless of which vantage point is selected.

1. *Common Law Jurisprudence Apportioned the Burden of Proof to Defendants in Many Contexts.*

a. *Tort Litigation*

At common law, defendants in civil tort litigation bore burdens of proof much greater than those assigned to a withdrawing employer under MPPAA. English courts virtually subjected civil defendants to absolute liability in tort. As noted by one commentator in the Yearbook of Edward IV, who would later become Chief Justice Brian of the Court of Common Pleas, "if a man commits an assault upon me and I cannot avoid him if he wants to beat me and I lift my stick in self-defense in order to prevent him, and there is a man in back of me and I injure him in lifting my stick, in that case he would have an action against me, although my lifting the stick was lawful to defend myself and I injured him without intent." *Anonymous*, King's Bench, Y.B. Edw. IV, f.7, pl. 18 (1466).

Similarly, the famous "trainband" case of *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616) arose from an injury in which one militiaman accidentally wounded a comrade during a training exercise. The injured militiaman sued for damages. The King's Bench ruled for the plaintiff, explaining that "no man shall be excused of a trespass . . . except it may be judged utterly without his fault." The following passage explains the type of showing which a defendant would have to make to escape liability:

> As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances, so as it appeared to the Court that it had been inevitable and that the defendant had commited no negligence to give occasion to the hurt.

This severe apportionment of the burden of proof sprang from social policy. Common law courts were primarily interested in maintaining the King's Peace, and feared that failure to compensate injuries would lead to private acts of vengeance. The pro-plaintiff policy evident in *Weaver v. Ward* sought to encourage litigation rather than private vendettas. W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 4, at 21 (5th ed. 1984).

The strict liability rule of *Weaver v. Ward* and its related precedents remained in effect in England until well into the twentieth century.[6] While this pro-plaintiff policy eroded more quickly in the United States, it remained fully in effect at the time that Due Process Clause of the Fifth Amendment was added to the Constitution. Indeed, the first precedent which clearly placed the burden of proof upon the plaintiff in a tort case was the famous opinion of the Supreme Judicial Court of Massachusetts, authored by Chief Justice Lemuel Shaw, in *Brown v. Kendall*, 60 Mass. (6th Cush.) 292 (1850). Most jurisdictions eventually adopted that holding *Brown v. Kendall*. Keeton, *supra*, § 29 at 163. This Court did so in *The Nitroglycerin Case*, 82 U.S. (15 Wall.) 524, 538-39 (1873).

Significantly, the shift from the pro-plaintiff position of *Weaver v. Ward* to the defense-oriented holding of *Brown v. Kendall* was not based upon any view of civil defendants' inherent rights. Rather, the change reflected an effort to bring the law in accord with the courts' evolving view of public policy. Oliver W. Holmes, *The Common Law* 83-103 (Howe ed. 1963).

The historical development of the "burden of proof" in tort litigation demonstrates that any challenge to the MPPAA presumptions collapses under the weight of common-law history in accordance with *Patterson*. Judicial precedents such as *Brown* and *Nitroglycerin* did not shift the burden of proof in civil litigation to the plaintiff until over a half century after the adoption of the Due

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[6] The doctrine was not eliminated until the decision of *Fowler v. Lanning*, [1959] 1 Q.B. 426.

Process Clause of the Fifth Amendment, and the situation was still fluid at the enactment of the Fourteenth Amendment. Hence, the petitioner cannot successfully contend that the drafters of the Due Process Clause intended to prevent Congress from apportioning the burden of proof to a party similarly situated to a withdrawing employer under MPPAA.

Perhaps more importantly, a decision by this Court finding a procedural due process defect in apportionment of the burden of proof under MPPAA could seriously impair the ability of Congress, other legislative bodies, and state courts to adjust the law to meet present day needs. *Brown v. Kendall* was by no means the last word in apportionment of the burden or proof in tort litigation. The late nineteenth and early twentieth centuries saw continued evolution of the burden of proof, reflecting an evolution in public policy. *See, e.g.*, Edward H. Levi, *An Introduction to Legal Reasoning* 8-27 (1949) (discussing the changes in tort law during that time period). Proper apportionment of these burdens continues to generate spirited debate, and can be expected to do so in the future.[7] This changing process is necessary if American jurisprudence is to grow with society.

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[7] For example, in the area of products liability one commentator has noted that, "[i]n recent years, some courts have held that policy considerations as to who should bear the risk of loss when the precise manufacturer cannot be identified justifies allocating the risk of loss to two or more or even a large group of manufacturers, anyone of whom could have been the manufacturer, as when each one of a group of manufacturers makes and sells an identical type of product, such as a generic drug." Keeton, *supra*, § 103 at 713. The noted case of *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980) is commonly cited as support for this pro-plaintiff apportionment of burdens. Some courts, however, have taken the contrary viewpoint. *See e.g., Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988) (applying District of Columbia and Maryland law); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D. S.C. 1981); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986); *Payton v. Abbott Laboratories*, 386 Mass. 540, 437 N.E.2d 171 (1982).

A decision by this Court which, in effect, guaranteed that defendants would bear the burden of proof in all civil litigation not only would flout the common law history which is dispositive under *Patterson*, but also would dampen future evolution of the law. To prevent that untoward result, this Court should reaffirm the ability of the law to adjust burdens of proof to reflect societal needs and changes.

b. *Other Policy Questions*

Tort law is only one example in which social policies have affected the burden of proof. Courts have often adjusted the burdens of proof as a means of "handicapping a disfavored contention." 2 McCormick, *Evidence* § 337 at 429 (4th ed. 1992). For example, defendants have the burden of proof in establishing a variety of affirmative defenses which the law is reluctant to recognize, such as contributory negligence, the statute of limitations, and duress. *Id.; Mason v. United States*, 84 U.S. 67, 74 (1873) ("Duress, if proved, may be a defence to an action, and it would doubtless be sufficient to relieve a party from the effect of compromise which was procured by such means, but the burden of proof to establish the charge, in every such case, is upon the party making it . . . .").

Courts have also traditionally disfavored a finding that a child was born illegitimate. Therefore, there has long been a presumption that a child born to a married woman is also the child of that woman's husband.[8]

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[8] "That a child born of a married woman during wedlock is presumed to be the child by her then husband is uniformly conceded. The only doubt has been whether and how far this presumption is conclusive . . . ." 9 Wigmore, *Evidence* § 2527 at 584-89 & nn. 1-4 (Cadbourn rev. 1981) and at 911-12 (1992 Supp.) (citing authorities from England, Canada, the Philippines, forty states, the District of Columbia and Puerto Rico).

Slavery offers another interesting illustration of how social policy affects the burden of proof in civil litigation. Although English

This Court, moreover, specifically enforced a presumption against a defendant in *Dick v. New York Life Insurance Company*, 359 U.S. 437 (1959). The case arose when the plaintiff sued an insurance company for double indemnity benefits after the death of her husband caused by gun-shot wounds. The defendant relied upon language in the governing policy which withheld double indemnity payments for death by suicide. In accordance with North Dakota law, which was controlling, the trial court instructed the jury that the defendant "had the burden to show by a fair preponderance of the evidence that [the decedent] committed suicide." *Id.* at 442. Although the Court of Appeals for the Eighth Circuit reversed, this Court reinstated the jury verdict. Chief Justice Warren, author of the opinion, explained that "[i]n a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." *Id.* at 446.

As one commentator has noted, "the holding of the Court in *Dick*" and related legal developments "make it extremely unlikely that there are now serious constitutional limits on the effect that may be given to presumptions in civil cases." 2 McCormick, *supra* § 345 at 479.[9]

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common law recognized the status of villenage, or serfdom, courts were hostile toward the institution. Therefore, in any litigation focusing on whether an individual was a serf, the burden of proof rested upon the party attempting to establish villenage, regardless of whether that party was a plaintiff or a defendant. *See* A. Leon Higginbotham, *In the Matter of Color* 339 (1978). This presumption in favor of freedom figured prominently in *Somersett v. Stewart*, 13 Geo. 3 (Easter Term 1772), an opinion by Lord Mansfield, which effectively outlawed slavery within England. Higginbotham, *supra* at 341-344.

[9] *See also* Wigmore, *supra*, Chapter 90 "Burdens and Presumptions in Specific Issues," §§ 2500-2540 (discussing legal presumptions and the burdens of proof in such diverse areas as, *inter alia*, testamentary sanity, § 2500; criminal sanity, § 2501; undue influence and fraud, §§ 2502-03; marriage, § 2505-06; loss by a bailee, § 2508; defective machinery, § 2509; self-defense and alibi, § 2512; possession of stolen goods, § 2513; alteration of documents, § 2525; continuity of ownership, § 2530; continuity of life, § 2531; death, §§ 2537a-e; survivorship in a common disaster, § 2532; similarity of foreign law, § 2536; and malicious prosecution, § 2539).

Conversely, a decision by this Court adopting the Third Circuit's position in *Yahn & McDonnell* would turn each of these presumptions into a new constitutional case.

c. *Apportionment of the Burden to the Party with Superior Access to the Facts*

The burden of proof has also been apportioned under the principle that:

> [W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden or proving the issue. Examples of the burdens commonly placed upon the defendant to prove payment, discharge in bankruptcy, and license.

2 McCormick, *supra*, § 337 at 429. This doctrine has deep roots in the common law, predating the enactment of the Due Process Clause. William H. Bailey, *Onus Probandi* 1 (1886) ("In every case the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant."). *See also*, 3 William Blackstone, *Commentaries* *366 ("[P]roof is always first required upon that side which affirms the matter in question.").

The concept that the party with "peculiar knowledge of the facts" should bear the burden of proof is particularly appropriate in many aspects of MPPAA litigation. For example, in the case at bar one of the issues litigated before the arbitrator was the date of the withdrawal. The facts central to that question hinged upon the petitioner's operations in 1981 (Petitioner's Brief at 12-14). The petitioner, and not the pension fund, obviously had possession of the relevant facts. Therefore, common law

principles would assign the burden of proof on such an issue to withdrawing employers.[10]

2. *The Precedents of this Court Have Steadfastly Refused to Interfere with Burdens of Proof in Analogous Situations.*

The decisions of this Court add further weight against the petitioner's position. *Lavine v. Milne*, 424 U.S. 577 (1976) involved the validity of a New York welfare statute that denied benefits for seventy five days to individuals who voluntarily ceased employment. The plaintiff challenged a provision in the statute which assigned to him the burden of proof on the issue of whether he had voluntarily quit his prior job. This Court upheld the New York statute explaining that:

> Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application. It may be that establishing the absence of an illicit motive—as § 131(11) requires appellees to do—is difficult, although as appellant argues, an applicant's motive should be best known by the applicant himself. However that may be, it is not for us to resolve the question of where the burden ought to lie on this issue. *Outside the criminal law area,*

[10] This principle would apply to several other issues which commonly arise in MPPAA litigation. For example, an employer may defeat or reduce a withdrawal liability assessment by demonstrating that: the plan's calculations include contribution base units attributable to a facility which ceased prior to September 26, 1980, MPPAA § 4217, 29 U.S.C. § 1397; the employer ceased to exist due to a mere change in corporate structure without interruption of contributions, MPPAA § 4218(1), 29 U.S.C. § 1398(1); contributions were suspended by a labor dispute, MPPAA § 4218(2), 29 U.S.C. § 1398(2); the employer has liquidated or disposed of its assets by an arm's length transaction, MPPAA § 4205, 29 U.S.C. § 1405. These issues are in the nature of affirmative defenses. Furthermore, these aspects of the statute, like the "avoid or evade" provision of MPPAA § 4212(c), 29 U.S.C. § 1392(c), turn on facts "peculiarly within the knowledge" of the employer.

> *where special concerns attach, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.*

Id. at 585 (emphasis added). No reason exists to reach a different conclusion in the context of MPPAA.

This Court has permitted the burden of proof to be assigned to parties attempting to vindicate interests much more serious than simply money. As indicated above, *Patterson* and its related precedents have demonstrated this point in the context of criminal law, where constitutional protections are at their apex. Other such examples exist.

In *Vance v. Terrazas*, 444 U.S. 252 (1980), this Court upheld Congress' apportionment of the burden of proof in expatriation proceedings. The case arose when the State Department determined that an individual, Terrazas, had lost his United States citizenship. The governing statute, the Immigration and Nationality Act, 8 U.S.C. § 1481, contained two provisions related to the burden of proof. The first provided that the State Department could prevail by simply showing by a preponderance of the evidence that Terrazas had *voluntarily* renounced his American citizenship. The second, and for present purposes more important, provision created a presumption in favor of voluntariness when an individual committed an act outwardly signifying expatriation. This presumption weighed against Terrazas, who had signed a declaration of allegiance to Mexico. The Court of Appeals for the Seventh Circuit invalidated the statute on the ground that the State Department was obligated to prove its case by "clear and convincing evidence." This Court reversed.

With the respect to the first issue, the general burden of proof, the *Terrazas* Court noted that "expatriation proceedings are civil in nature and do not threaten a loss of liberty." Therefore, this Court refused to interfere with the "congressional judgment" concerning the apportionment of the burden of proof. 444 U.S. at 266-267.

With respect to the evidentiary presumption, which shifted the burden of proof to *Terrazas*, this Court stated:

> To invalidate the rule here would be to disagree flatly with Congress on the balance to be struck between the interest in citizenship and the burden of the Government must assume in demonstrating expatriating conduct. It would also constitutionalize the disagreement and give the Citizenship Clause of the Fourteenth Amendment far more scope in this context than the relevant circumstances that brought the Amendment into being would suggest appropriate. Thus we conclude that the presumption of voluntariness included in [the statute] has continuing vitality.

Id. at 550.

Terrazas demonstrates that Congress has the right to apportion the burden of proof in determining whether an individual retains the precious *constitutional* right of United States citizenship. In light of that decision, it is inconceivable that the Due Process Clause could impair Congress' apportionment of the burden of proof in determining whether a corporation pays withdrawal liability.

Further support for the evidentiary presumptions in MPPAA § 4221 comes from the highly specialized area of death penalty law. *Walton v. Arizona*, 497 U.S. 639 (1990) considered the constitutionality of an Arizona statute which provided that a convicted defendant could avoid execution by establishing mitigating factors, such as diminished capacity, duress, limited participation in the underlying offense, an inability to foresee that the conduct in question would cause another's death, or youthful age. Significantly, the Arizona statute also provided that "the burden of establishing mitigating circumstances is on the defendant." *Id.* at 3052.

The *Walton* defendant argued before this Court that the statute violated, *inter alia*, procedural due process by assigning the burden of proof to him on the issue of

mitigation. Citing *Patterson*, *Martin*, and related precedents, this Court held that "a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 3055. Again, if the state of Arizona could apportion the issue of mitigation to the defendant in a death penalty case, no reason exists to deny Congress the right to assign the burden of proof to a withdrawing employer under MPPAA.

B. Congress' Plenary Power to Establish the Burden of Proof Concerning Rights Created by Federal Legislation Further Undermines the Petitioner's Due Process Position.

The cases cited above to support flexibility in the apportionment of burdens of proof involve rights which were either created by the United States Constitution itself, *e.g.*, citizenship in *Terrazas*, or by state law, *e.g.*, welfare benefits in *Lavine*. The congressional power to set burdens of proof is even greater with respect to rights that arise wholly from federal legislation. As the plurality explained in *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 459 U.S. 813 (1982):

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, *to create presumptions, or assign burdens of proof*, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.

Id. at 83 (emphasis added). This statement reflects the current status of the law.[11]

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[11] Every lower court case to consider the issue has found that the passage from the plurality opinion in *Northern Pipeline* quoted above accurately reflects the views of this Court. *In re Walters*, 868 F.2d 665, 670 (4th Cir. 1989); *In re Mankin*, 823 F.2d 1296, 1304 (9th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988); *United*

The logic of *Northern Pipeline* mandates the affirmance of the Ninth Circuit ruling below. Congress created MPPAA. Consequently, Congress has plenary power to establish the presumptions and burdens of proof incidental to the statute.

The rationale for deference to Congress is particularly compelling under the facts of this case. *Pension Benefit Guaranty Corp. v. R.A. Gray*, 467 U.S. 717, 734 (1984) unanimously sustained MPPAA against another challenge based upon the Due Process Clause of the Fifth Amendment. This Court held that, even if applied retrospectively, the statute reflects a rational legislative attempt to deal with the threat to the pension system caused by employer withdrawals. In enacting MPPAA, Congress also concluded that the burdens of proof established by MPPAA § 4221(a), "are necessary to ensure the enforceability of employer liability." *See* The Report of the House of Representatives' Committee on Education and Labor, 1980 U.S. Cong. & Admin. News 2918, 2954. Nothing in the Due Process Clause provides a basis for this Court to second-guess that conclusion.

Ironically, prior to *Yahn & McDonnell*, the Third Circuit recognized that *Northern Pipeline* sustains the MPPAA procedural scheme. In *Terson Company* v. *Bakery Drivers & Salesmen, Local 194*, 739 F.2d 118 (3d Cir. 1984), the employer challenged the constitutionality of the MPPAA dispute resolution scheme as a denial of the right to a trial by jury. The Third Circuit cited the very

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Transportation Union v. Consolidated Rail Corporation, 593 F. Supp. 1346, 135 (Regional Rail Reorg. Ct. 1984).

Also, in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), this Court cited the plurality opinion in *Northern Pipeline* as authority for sustaining the dispute resolution mechanism of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y which, like MPPAA, directs disputes to arbitration. *Thomas* provides further support for Congress' plenary power to determine the manner in which disputes concerning federal statutory rights are resolved.

language from the plurality opinion in *Northern Pipeline* quoted above as authority for upholding the MPPAA arbitration scheme, reasoning that MPPAA arbitration is the type of "particularized tribunal" to which Congress could assign the resolution of statutory rights. *Id.* at 121. Yet, the same language in *Northern Pipeline* which states that Congress can assign resolution of disputes to a "particularized tribunal" also states that Congress can "create presumptions" and "assign burdens of proof." Hence, even the case law of the Third Circuit—the only jurisdiction to accept the rationale offered by the petitioner herein—recognizes that *Northern Pipeline* and its related authorities further undermine the due process challenge to MPPAA § 4221(a).

III. A DECISION OF THIS COURT OVERTURNING THE BURDENS OF PROOF ESTABLISHED BY MPPAA § 4221(a) COULD CAUSE CHAOS FOR THE ENFORCEMENT OF OTHER STATUTES AND THE CONDUCT OF MANY FORMS OF LITIGATION.

As previously discussed, the burden of proof established by MPPAA is on as sound a constitutional footing as those burdens upheld in cases such as *Patterson v. New York*, *Martin v. Ohio*, *Leland v. Oregon*, *Morrison v. California*, *Dick v. New York Life Insurance Company*, *Lavine v. Milne*, *Vance v. Terrazas*, and *Walton v. Arizona*. This Court, therefore, cannot affirm the Third Circuit's doctrine in *Yahn & McDonnell* without calling into question the validity of these precedents. In that event, the Court would also be inviting new challenges to established burdens of proof in criminal law, tort law, welfare litigation, expatriation proceedings, and even the death penalty. No reason exists to engender such a tidal wave of relitigation.

Furthermore, adoption of the *Yahn & McDonnell* standard could throw the enforcement of a variety of other federal statutory and constitutional schemes into chaos. The following are a few examples of this phenomenon.

A taxpayer bears the burden of proof in litigation with the Government. *United States v. Janis*, 428 U.S. 433, 440 (1976) ("The policy behind the presumption of correctness and the burden of proof would appear to be applicable" for both "tax collection" suits and "tax refund" suits); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289-90 (1929). No principled reason exists for giving a taxpayer a more serious burden of proof than a withdrawing employer under MPPAA. Hence, adoption of the *Yahn & McDonnell* stadard could threaten the federal tax system.

Similarly, this Court has mandated substantial burdens of proof upon prisoners in constitutional litigation. As explained in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977), "[b]ecause the realities of running a penal institution are complex and difficult, we have . . . recognized the wide-ranging deference to be accorded the decisions of prison administrators." Even when attempting to vindicate constitutional rights, prisoners cannot prevail unless they can show that the challenged decision was not "rationally related" to the "reasonable" objectives of "prison administration." *Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989).

If this Court were to adopt the Third Circuit position in *Yahn & McDonnell*, then prisoners could very well use the precedent to mount a challenge to the burden of proof established by *Jones* and related authorities. Prisoners could argue that they, like withdrawing employers under MPPAA, are challenging the decision of an agency with which they stand in an inherently adversarial relationship. Citing the rationale of *Yahn & McDonnell*, they could assert that the heavy burden of proof set forth in *Jones*, which incidentally far outweighs anything in MPPAA § 4221(a), subjects prisoners to an inherently biased adjudicatory procedure. Of course, the flaw in the prisoners' position would be the same as that of the petitioner advanced herein; *viz.*, the initial agency action is not "adjudicatory" in nature. However, no principled

basis exists for this Court to overturn the MPPAA procedural scheme while sustaining the current body of prison jurisprudence.

Similarly, rejection of the MPPAA presumptions would impair the continuing vitality of this Court's decision in *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101 (1989). In *Bruch*, this Court held that the decision of a fiduciary of an employee benefit plan to deny benefits to a participant deserves deference as long as the plan document grants the sponsor discretion to resolve such employee benefit claims. *Id.* at 111. Significantly, *Bruch* held that any bias on the part of a plan fiduciary would be judged on a case-by-case basis, rather than by a structural challenge of the type urged herein by the petitioner. *Id.* at 115.

It is impossible to draw a distinction for constitutional purposes between the burden of proof set forth in MPPAA § 4221(a) and the deference recognized by this Court in *Bruch*. There is no doubt that the *Bruch* rule passes constitutionl muster. Indeed, the Court emphasized that the precedent has common law roots of the type which insulates it from constitutional attack under *Patterson*. *Id.* at 110-15. Nevertheless, if this Court renders an opinion which holds that MPPAA § 4221(a) establishes a biased adjudicatory process, then *Bruch* would necessarily fall as *Bruch* also mandates deference to the actions of a plan sponsor.

CONCLUSION

The *amici* herein realize that eminent scholars and jurists have debated the underpinnings of procedural due process. One school of thought, which follows the logic of *Patterson v. New York*, provides that:

> All theories of constitutional law not based on the original understanding [of the Framers] contain inherent and fatal flaws. That is true whether the theories are liberal or conservative.

Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 251 (1991). MPPAA § 4221(a)

clearly survives under this analysis. The common law tradition in effect at the time that the Framers enacted the Due Process Clause demonstrates that nothing in the underlying intent of the provision conceivably supports a challenge to MPPAA § 4221(a).

Another well recognized philosophy contends that due process must be "open to judicial elaboration in accord with the changing views of fundamental fairness." Laurence H. Tribe, *American Constitutional Law* 670 (1988). MPPAA § 4221(a) also survives under this analysis. As discussed above, this Court has sustained burdens of proof ranging from expatriation to the death penalty which are no more severe than what the petitioner herein confronts. No concept of "fundamental fairness" would question this attempt by Congress to improve the pension system in the United States.

For the foregoing reasons, the Vicinity Fund and the Dairy Plan pray the Court to affirm the decision of the Court of Appeals for the Ninth Circuit.

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Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

(14)

No. 91-904

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF RESPONDENT

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1992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF RESPONDENT

The American Academy of Actuaries submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of respondent in No. 91-904, having obtained the written consent of both the petitioner and the respondent to do so. Said written consent accompanies this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Academy of Actuaries (the "Academy") is a nonprofit professional association established in 1965 to provide a common membership organization for actuaries of all specialties practicing within the United States, and to seek greater public recognition for the actuarial profession. To become an Academy member, an actuary must satisfy rigorous education and experience requirements. Membership in the Academy is a requirement in many states to perform certain types of actuarial work. The Academy's primary activities include liaison with federal and state governments, relations with other professions, dissemination of public information about the actuarial profession, and the promulgation and implementation of standards of professional conduct, practice and qualification. The Academy's membership exceeds 10,000 actuaries nationwide.

The Academy maintains an Actuarial Standards Board (the "ASB"), an independent, quasi-legislative body, to develop and adopt Standards of Practice for the actuarial profession. Actuaries who are members of the Academy and other professional associations are required to comply with the ASB's practice standards, which are detailed and serve as a guide for sound actuarial practice. The Academy has also adopted a Code of Professional Conduct to govern the professional ethics of its members.[1]

The Standards of Practice and the Code of Professional Conduct are administered by another independent body, the Actuarial Board for Counseling and Discipline (the

[1] Prior to the adoption of the Code, the Academy maintained Guides to Professional Conduct to govern the ethical conduct of its members; the Guides were supplemented by Interpretative Opinions. Interpretative Opinions 3 and 4 were recently republished by the ASB, and are incorporated by reference in several of the ASB's Standards of Practice. Copies of relevant Standards of Practice, the Code of Professional Conduct, and Interpretative Opinions 3 and 4 are appended hereto, and have been lodged with the Court with the consent of the petitioner and respondent.

"ABCD"). The ABCD's purpose is to maintain a high quality of actuarial practice by investigating complaints against actuaries, and counseling actuaries concerning the application of standards of practice, conduct and qualification to their professional activities. The Academy and four other United States actuarial organizations have delegated to the ABCD responsibility to investigate complaints against their members, and to counsel their members in sound actuarial practice and conduct. The ABCD is also authorized to recommend to those organizations that public discipline in the form of reprimand, suspension or expulsion from membership be taken against actuaries where serious violations have occurred.

The Academy has numerous members who provide actuarial services to multiemployer pension plans. These members furnish the plans with expert valuations from which, among other things, the withdrawal liability of employers may be determined. The Academy anticipates that the Court's decision in this case may have a significant effect upon the professional practice of these actuaries. Moreover, as an organization representing actuaries, the Academy is uniquely positioned to advise the Court of the actuarial profession's efforts to insure that its members observe high standards of practice and conduct, standards which petitioner's arguments seem to undervalue. Indeed, the allegations made by petitioner Concrete Pipe and Products of California, Inc. ("CPP") impugn both the integrity of the actuarial profession and the level of expertise required to render actuarial advice, suggesting that the expert opinions of actuaries serving multiemployer pension plans should not be accorded significant evidentiary weight. The Academy disagrees with CPP's allegations and, accordingly, has a substantial interest in the outcome of this proceeding.[2]

[2] The Academy takes no position as to the second issue raised in proceeding, namely, whether the provisions of the Multi-Employer Pension Plan Amendments Act were unconstitutional as applied to CPP in this particular case.

SUMMARY OF ARGUMENT

The evidentiary assumptions created by the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. § 1381 *et seq.*, are fully consistent with Congress' purpose in adopting the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.* Contrary to CPP's assertions, the presumptions do not deprive withdrawing employers of an impartial decision-maker, because the actuaries whose valuations serve as the basis for withdrawal assessments are required by the standards of their profession to render their valuation opinions in an unbiased, ethical manner. Further, in the rare case where an actuary departs from the standards of practice and conduct required by the profession, the review procedures established by MPPAA provide an appropriate means to insure that employers will not be required to pay unreasonable withdrawal assessments.

Actuaries have been recognized by the courts as expert professionals who are well-equipped to make the complex calculations necessary to achieve reasonable withdrawal assessments. Congress' decision to accord special weight to actuaries' expert views is within its authority to establish evidentiary rules, and is a reasonable means to achieve its objectives under ERISA. The Academy therefore requests that the decision of the court below upholding the constitutionality of the evidentiary presumptions established by MPPAA be affirmed.

ARGUMENT

ERISA was enacted, among other things, to prevent employees from suffering the devastating loss of their pension benefits through unanticipated plan termination. *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 374 (1980). However, ERISA's original termination liability provisions created an incentive for employers to withdraw from a multi-employer pension plan at the first sign of financial trouble, rather than be saddled with heavy liability to the Pension Benefit Guaranty Corporation if the plan ultimately failed. *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 216 (1986), *citing* Pension Plan Termination Insurance Issues: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means House of Representatives, 95th Cong., 2nd Sess. 22 (1978) (statement of Matthew M. Lind). Congress enacted MPPAA "as part of an overall statutory scheme to safeguard the solvency of [multiemployer] pension plans." *Connolly, supra* at 228.

MPPAA requires employers, upon withdrawing from plans, to pay "a *fixed and certain debt* to the pension plan." *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, 467 U.S. 717, 725 (1984), *quoting* 29 U.S.C. §§ 1381, 1391 (emphasis added). The employer's withdrawal liability is determined by the plan trustees, based upon calculations made by the plan's actuary. If the employer challenges the assessment in arbitration, the calculations are presumed by the arbitrator to be correct unless the employer "shows by a preponderance of the evidence that the determination was unreasonable in the aggregate or clearly erroneous." 29 U.S.C. § 1401(a)(3) (1982). The arbitrator's findings of fact are subject to a similar rebuttable presumption of validity if either party brings suit to enforce, vacate or modify the arbitrator's award. 29 U.S.C. § 1401(b)(2) (1982).

I. THE ACTUARIAL PROFESSION REQUIRES ITS MEMBERS TO PERFORM WORK IN A COMPETENT, UNBIASED AND ETHICAL MANNER

CPP's claim that it was denied access to an impartial decision-maker rests entirely upon its assertion that the presumptions established by MPPAA cannot effectively be rebutted. *See generally Brief on the Merits by Petitioner* (July 10, 1992) at 43-49. However, CPP is mistaken in its assertion that "there is no objective yardstick" to measure the fairness of the actuary's assumptions. *Petition for Certiorari* (December 3, 1991) at 13. MPPAA requires actuarial calculations to be reasonable in the aggregate, "taking into account the experience of the plan and reasonable expectations." The calculations must also "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a). This provision requires actuaries to exercise their expert judgment in the selection of actuarial *assumptions*. It does not allow them to make unreasonable calculations, or to ignore a plan's history or likely future experience.

The ASB has adopted two Standards of Practice that offer specific guidance to pension actuaries. Actuarial Standard of Practice No. 4, "Recommendations for Measuring Pension Obligations," contains detailed instructions for measuring and communicating pension obligations. *See generally App.* A-1 - A-21.[3] Actuarial Standard of Practice No. 12, "Concerning Risk Classification," sets forth specific "guidelines for actuaries in designing, using and updating risk classification systems," to insure fairness and "soundness of the financial security system." *See App.* A-24 - A-25, §§ 1.1., 5. The ASB has also adopted Actuarial Standard of Practice No. 17, "Expert Testimony by Actuaries," which applies to testimony concerning "[w]ithdrawal liability assessments under multiemployer plans." *See App.* A-35, § 4.1(J). That Standard specifically states that a conflict of interest exists "whenever the actuary's objectivity, or duty owed to a client or employer, is impaired by competing interests," and requires the actuary to disclose the conflict "to all interested parties." *See App.* A-36, § 5.2. The Standard further provides that "[t]he actuary's fundamental obligation when giving expert testimony is to provide the forum with a *valid actuarial opinion*." *See App.* A-36, § 5.5 (emphasis added).

[3] The ASB is also developing a Standard to provide actuaries with detailed guidance on the selection of economic assumptions for measuring pension plan obligations.

Departure from these standards could bring an actuary before the ABCD, and could lead to counseling or, if the actuary's failure to comply with the standards was sufficiently severe, to public reprimand, suspension or expulsion from membership. Failure to comply with the standards might also constitute substantial evidence in arbitration or litigation that the plan actuary assumptions were not, in the aggregate, reasonable. *Cf.* 29 U.S.C. § 1393(a).

Similarly, the Code of Professional Conduct requires actuaries to "perform professional services with integrity, skill and care," and to refuse to provide services if the actuary "believes they may be used to violate or evade the law." *See App.* A-38, A-39, Precepts 2, 9. An actuary who deliberately distorted a withdrawal liability calculation in order to inflate the employer's liability arguably should anticipate that the calculation would be used to evade the "reasonableness" requirements of MPPAA, in violation of Precept 9 of the Code. Such a biased calculation would not be rendered with the integrity that Precept 2 of the Code requires. Again, an actuary who failed to satisfy these requirements would be subject to counseling, public reprimand, suspension or expulsion from the actuary's professional organizations.

The Interpretative Opinions that were recently republished by the ASB, and that are incorporated by reference into several of the Standards of Practice, also require actuaries to exercise their professional judgment in an in-

dependent and ethical manner. Interpretative Opinion 4 requires all actuarial assumptions and methods to be "selected and applied with integrity, informed judgment and perspective in relation to the circumstances applicable to the particular situation and the purpose for which the results are intended." *See App.* A-44. Further, in an instance where a client or employer requests a service that conflicts with an actuary's professional judgment, Interpretative Opinion 3 requires the actuary to "advise the client or employer of the conflict and . . . include appropriate qualifications and disclosures in any related actuarial communications." *See App.* A-43. An employer, seeing these disclosures and qualifications, could use them in arbitration to challenge the reasonableness of the withdrawal assessment.

Thus, actuaries practicing under MPPAA are required by the standards and tenets of their profession to perform their work in a comptent, unbiased and ethical manner. An actuary is also required to disclose any departure from the actuary's expert judgment, or conflict of interest, in a manner that would give an employer opportunity to challenge the reasonableness of the withdrawal liability calculations.[4]

For this reason, CPP's general reliance upon *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787

[4] A plan might employ an actuary whose education or experience were insufficient to meet the membership requirements of the Academy or other actuarial membership organizations that have adopted the Standards and Code. Such an actuary would be beyond the jurisdiction of the ABCD. However, that actuary's credentials would, presumably, be considered as a factor when weighing the actuary's testimony, just as the respective credentials of CPP's actuary and the plan actuary were considered by the arbitrator and district court in this case. *See Construction Laborers Pension Trust for Southern California v. Cen-Vi-Ro Concrete Pipe and Products*, Civ. Action Nos. 82-5184 HLH and 88-5759 HLH (C.D. Cal. July 3, 1989), *Joint Appendix*, Vol. II at 423.

F.2d 128 (3rd Cir. 1986), *aff'd without opinion by a divided Court*, 481 U.S. 735 (1987), is misplaced. In *Yahn*, the court asserted that withdrawing employers are deprived of an unbiased decision maker because the plan trustees are fiduciaries of the plan and, therefore, inherently biased in favor of the plan and its beneficiaries. 787 F.2d at 139-41. The *Yahn* court's assertions of trustee bias are no more than "generalized assumptions of possible interest" based solely upon the institutional role assigned to the trustee by MPPA. As this Court has noted, "[s]uch assertions require substantiation before they can provide a foundation for invalidating an Act of Congress." *Schweiker v. McClure*, 456 U.S. 188, 196 n. 10 (1982).

Moreover, the statutory obligations of the trustees will not necessarily result in unfairness to employers. As the First Circuit Court of Appeals has recognized:

> [Plan trustees'] knowledge that they must act uniformly over time, treating like cases alike, significantly cabins their discretion, for it tends to create a uniform employer interest in favor of fair rules and, given the need to maintain employer membership and satisfaction, it entails a trustee obligation of fair treatment to withdrawing employers as part of their obligation to the fund.

Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund, Inc., 762 F.2d 1137, 1141 (1st Cir. 1987).

Even if plan trustees may be assumed to be unfairly biased as stated in *Yahn*, however, actuaries working for plans are prohibited by the tenets of their profession from indulging in such bias. Further, in the rare instance where an actuary fails to exercise impartial professional judgment in making MPPAA calculations, the review process established by MPPAA should suffice to reveal the actuary's bias. For example, in *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3rd Cir. 1990), the Third

Circuit Court of Appeals reiterated its assumption that MPPAA trustees are inherently biased and extended that assumption to plan actuaries, arguing that, because the plan pays the actuary, the trustees may exert undue influence over the actuary. 916 F.2d at 93, *citing United States v. Will*, 449 U.S. 200, 217-19 (1980). However, both the arbitrator and the court in *Huber* were able to determine from minutes of a Board of Trustees meeting that the assumptions and methods used in the actuary's valuation were not the product of impartial professional expertise, but appeared to have been influenced by pressure from the plan trustees to inflate employer withdrawal liability. 916 F.2d at 90, 93. *Huber* demonstrates that the MPPAA review procedures should be sufficient to protect employers in the exceptional case where an actuary yields to undue influence.

II. ACTUARIES HAVE SPECIAL EXPERTISE, AND ARE WELL QUALIFIED TO RENDER MPPAA VALUATIONS

As this Court previously observed when deliberating the constitutionality of MPPAA, Congress was not required, when drafting the statute, to select the best possible method for achieving its objectives, but merely to enact legislation that was rationally related to Congress' legislative purposes. *R.A. Gray & Co., supra*, 467 U.S. at 729-30, *citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (additional citations omitted). MPPAA's evidentiary presumptions represent Congress' recognition that actuaries possess special expertise, and are uniquely qualified to render the calculations upon which reasonable withdrawal assessments may be based.

Congress included in MPPAA the rebuttable presumptions that are at issue here "to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Session, 1, 86, 1980 U.S. Code Cong. & Admin. News 2918, 2954. Without the presumptions, withdrawing employers might be expected to challenge every withdrawal liability assessment, and not merely those that are unreasonable or erroneous. These constant challenges would waste plan assets by forcing trustees to defend complex actuarial calculations, and would create ongoing doubt that the "fixed and certain debt" assessed by MPPAA would be paid by withdrawing employers, thereby complicating the actuary's efforts to project the plan's future assets. *Cf. Gray, supra*, 476 U.S. at 725, *quoting* 29 U.S.C. §§ 1381, 1391.

As the courts have recognized, "[a] fund's actuarial soundness at any specific time depends on a complex interaction of many factors including anticipated life spans of beneficiaries, estimated appreciation or depreciation of fund assets, and the likelihood that the contribution base will remain stable." *Board of Trustees of the Western Conference of Teamster Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1402 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985), *citing Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d 1247, 1267 (7th Cir. 1983), *cert. denied*, 469 U.S. 1259 (1984). Given that legitimate differences of opinion may exist as to actuarial assumptions and methods, Congress "created the statutory presumption in favor of withdrawal determinations expressly to forestall endless disputes 'over technical actuarial matters with respect to which there are often several equally "correct approaches."'" *Combs v. Classic Coal Corporation*, 931 F.2d 96, 99-100 (D.C. Cir. 1991), *quoting* S. 1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration*, 98th Cong., 2nd Sess. 21 (1980). We know of no class of pension professionals that is better qualified than actuaries to assess the complex, interrelated factors that determine a plan's actuarial soundness, and to make the valuations from which

withdrawal assessments are calculated. MPPAA's withdrawal liabiilty procedures insure that "[c]omplex technical determinations of the amount of liability are allocated to those with the greatest expertise. Plans are protected under [MPPAA] from inconsistent judicial or arbitrator holdings by a range of acceptable actuarial methods." *Dorn's Transportation, Inc. v. I.A.M. National Pension Fund Benefit Plan A*, 578 F.Supp. 1222, 1238 (D.D.C. 1984), *aff'd without opinion*, 753 F.2d 166 (D.C. Cir. 1985); *see also Combs, supra*, 931 F.2d at 100. MPPAA does not require an actuary "to choose the figure that the court would choose as the most reasonable . . . . Rather, the only requirement is that in every case the actuarial determination will fall within the range of reasonableness." *Board of Trustees, Michigan United Foods and Commercial Workers Unions v. Eberhart Foods, Inc.*, 831 F.2d 1258, 1261 (6th Cir. 1987). This approach permits a plan actuary to exercise professional judgment in selection of actuarial assumptions and methods, while protecting the employer from being forced to pay an unreasonable withdrawal assessment. Congress' decision to structure MPPAA in this fashion was rationally related to Congress' legislative objectives, and should be upheld.

III. MPPAA'S EVIDENTIARY PRESUMPTIONS ARE REBUTTABLE

CPP's inability to marshall an adequate rebuttal in this case does not establish that MPPAA's evidentiary presumptions may never be rebutted. To the contrary, case law applying the presumptions demonstrates that actuarial calculations are subjected to careful scrutiny in arbitration and litigation, and are rebutted where circumstances warrant. *See, e.g., Huber, supra; see also Sigmond Cohn Corp. and Machinists District No. 15 Pension Fund*, 14 E.B.C. (BNA) 1031 (1991) (Sands, Arb.); *Carnation Co., Inc. and Central States Pension Fund*, 9 E.B.C. (BNA) 1409 (1988) (Nagle, Arb.); *Casablanca Industries, Inc. and U.F.C.W. Local 23-Giant*

Eagle Pension Fund, 7 E.B.C. (BNA) 2705 (1986) (Jaffe, Arb.); *Classic Coal Corp. v. U.M.W. 1950 and 1974 Pension Plans*, 5 E.B.C. (BNA) 1449 (1984) (Nagle, Arb.); *Palmer Coking Coal Co. and U.M.W. 1950 and 1974 Pension Plans*, 5 E.B.C. (BNA) 2369 (1984) (Gordon, Arb.); *Perkins Trucking Co. and Local 807 Pension Fund*, 4 E.B.C. (BNA) 1489 (1983) (O'Loughlin, Arb.).

As this Court has observed, "when Congress creates a statautory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof . . ." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (opinion of Brennan, J.). The Court has also held that, "when it comes to evidentiary rules in matters 'not within specialized judicial competence or completely commonplace,' it is primarily for Congress "to amass the stuff of actual experience and cull conclusions from it.'" *Turner Elkhorn, supra*, 428 U.S. at 33-34, *quoting United States v. Gainey*, 380 U.S. 63, 67 (1965).

Here, Congress has determined that the public interest in ensuring stability in multi-employer pension plans is best served by according evidentiary weight to the expert calculations of plan actuaries through a rebuttable presumption of reasonableness. Contrary to CPP's assertions, the presumption has been and can be rebutted effectively where the circumstances warrant. The Academy therefore urges the Court to affirm the constitutionality of the MPPAA evidentiary presumptions.

CONCLUSION

For the foregoing reasons, the Academy respectfully requests that the decision of the Court of Appeals below be affirmed.

Respectfully submitted,

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MOTION FILED
SEP 11 1992

(13)

No. 91-904

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,
v.
CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENT

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Petitioner,

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CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans (the "NCCMP") respectfully moves for leave to file the accompanying brief *amicus curiae* to urge the Court to affirm the decision below, upholding the constitutionality of the statutory, rebuttable presumption of correctness in favor of plan trustees and plan actuaries, in calculating multiemployer plan withdrawal liability.

The Respondent has consented to the filing of this brief; the Petitioner has not.

The NCCMP is a tax-exempt, nonprofit corporation organized to represent the interests of the more than nine million workers who participate in collectively bargained multiemployer plans. The NCCMP's affiliates include over 240 multiemployer plans and related international unions. Its affiliates together represent the great majority of the participants in multiemployer plans.[1] The NCCMP actively participated throughout the development and congressional consideration of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). *See Connolly v. PBGC*, 475 U.S. 211, 215 n.1 (1986). The NCCMP has been recognized as having had a "significant impact" on the 1980 Amendments by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed., July 24, 1980) and S10100 (daily ed., July 29, 1980). A reversal of the decision below will have an adverse impact on all multiemployer plans and, therefore, will be particularly adverse to the interest of NCCMP affiliates, which represent the majority of participants in multiemployer plans.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans.

We are concerned that a reversal of the decision below would disrupt severely the operation of multiemployer plans, mire the withdrawal liability determination process with frivolous challenges, frustrate the collection of appropriate amounts of withdrawal liability, and, consequently, undermine the financial stability of multiemployer plans and the millions of workers who look to these plans for pension benefits. Therefore, we respectfully request that this Court affirm the decision below.

Based on the foregoing, the NCCMP respectfully moves for leave to file the accompanying brief *amicus curiae*.

[1] The Respondent is affiliated with the NCCMP.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENT

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief *amicus curiae* in support of Respondent Construction Laborers Pension Trust for Southern California.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief.

The Petitioner in the instant case challenges the constitutionality of Section 4221(a)(3) of the Employee

Retirement Income Security Act ("ERISA") as amended by MPPAA, 29 U.S.C. § 1401(a)(3). That statutory Section provides that the determination of an employer's withdrawal liability by multiemployer plan trustees is presumed to be correct, unless the employer shows, by a preponderance of the evidence presented to an impartial arbitrator, that the trustees' determination is unreasonable or clearly erroneous. Every circuit court to address the issue, with one exception, has held that the rebuttable presumption of correctness in favor of the trustees meets constitutional muster.[1] That statutory section also provides that the actuarial assumptions and methods used in determining the plan's unfunded vested benefits are presumed correct, unless the employer shows, by a preponderance of the evidence presented to an impartial arbitrator, either that the actuarial assumptions and methods "were, in the aggregate, unreasonable" or that the plan's actuary made a "significant error" in applying the assumptions or the methods, 29 U.S.C. § 1401(a)(3)(B). No circuit court has found that this rebuttable presumption of actuarial correctness is constitutionally deficient.

The existing multiemployer plan rules, enacted under MPPAA in 1980, have been successful in facilitating

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[1] *See Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (*en banc*); *Board of Trustees v. Thompson Building Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers International*, 467 U.S. 1259 (1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir.), *cert. denied*, 467 U.S. 1259 (1984). The one exception was *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd sub nom. by equally divided vote, PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987).

sound funding of multiemployer plans. These plans are currently well-funded, on the whole, as is the government's multiemployer pension plan guaranty program administered by the Pension Benefit Guaranty Corporation ("PBGC"). In the twelve years since the enactment of MPPAA, multiemployer plan funding levels have risen dramatically. The most recent available information reveals that over 95 percent of these plans are more than 80 percent funded for vested benefit liabilities. Currently, the PBGC's multiemployer plan guaranty program is so well-funded that the PBGC recently proposed an increase in the program's guarantees, without an increase in premiums. The financial problems that have plagued the single-employer pension plan insurance program under Title IV of ERISA simply do not exist in the multiemployer program. The multiemployer insurance program is, in fact, overfunded with the current $2.60 per participant annual premium, in sharp contrast to the single employer insurance program, which is underfunded even with the current $53.00 per participant annual premium.

It is our belief that this legislation, including the provision challenged here, is essential to the viability of the federal pension benefit guaranty program established by MPPAA and contained in Title IV of ERISA. If the decision below is reversed, we are concerned that the result will be to disrupt severely the operation of multiemployer pension plans, to frustrate the collection of appropriate amounts of withdrawal liability, and, thereby, to endanger the retirement security of millions of American workers who participate in these pension plans. Therefore, the NCCMP submits this brief, urging affirmance of the decision below.

SUMMARY OF REASONS FOR AFFIRMANCE

A. This Court has upheld the constitutionality of the imposition of withdrawal liability as a rational congressional response to the need for safeguarding the

solvency of multiemployer pension plans. *Connolly v. PBGC*, 475 U.S. 211 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). Multiemployer plan administrators—*i.e.*, each plan's joint board of labor and management trustees, 29 U.S.C. §§ 1002(16)(A)(ii) and (16)(B)(iii)—determines the amount of an employer's withdrawal liability using one of four statutorily mandated methods of calculation. 29 U.S.C. §§ 1391(b), (c)(2), (c)(3), and (c)(4). MPPAA requires that the trustees uniformly apply the chosen method of calculation to all withdrawing employers. 29 U.S.C. § 1394(b). The determination of withdrawal liability involves the use of complex actuarial assumptions, 29 U.S.C. § 1391, so the trustees must rely on the expertise of the plan's actuary. In the event of a dispute over a withdrawal liability determination, the employer or the trustees may initiate arbitration in accordance with "fair and equitable procedures" promulgated by the PBGC, 29 U.S.C. § 1401(a)(2). In the arbitration proceeding, the trustees' determination of withdrawal liability and the actuary's calculation of unfunded vested benefits are presumed correct, 29 U.S.C. § 1401(a)(3)(A); however, the presumptions are rebuttable, *id.*

The Petitioner asserts that trustees, in making withdrawal liability determinations, play an adjudicatory role. They also assert that trustees have an inherent bias to maximize the calculation of withdrawal liability, thereby denying employers their due process right to an impartial adjudicator. To the contrary, all but one of the circuit courts to address this issue have held that the trustees' determination of withdrawal liability is a matter of general plan administration, not adjudication. *See, e.g., Keith Fulton & Sons, Inc. v. New England Teamsters and Tracking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (*en banc*). This administrative determination of the trustees is subject to review by impartial adjudicators: first, by an arbitrator chosen by the employer and the trustees, and then, by the federal judi-

ciary. 29 U.S.C. §§ 1401(a) and (b)(2). The MPPAA arbitration process and the availability of judicial review are consistent with this Court's "powerful and independent constitutional interest in fair adjudicative procedure." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980).

B. To correct what it perceives as a trustee and actuarial bias against withdrawing employers, the Petitioner asks this Court to strike down as unconstitutional the rebuttable presumption that the trustees' determination of withdrawal liability and the actuary's determination of unfunded vested benefits are correct. However, this Court has long upheld the constitutionality not only of rebuttable presumptions, *Mobile, J. & K.C.R. v. Turnipseed*, 219 U.S. 35 (1910), but also of irrebuttable presumptions, *Weinberger v. Salfi*, 422 U.S. 749 (1975).

Given the congressionally articulated need to preserve multiemployer pension plans and safeguard their solvency, *Connolly*, 475 U.S. at 227-28, the rebuttable presumption of correctness is a rational means to promote uniformity in the calculation of withdrawal liability and to discourage dilatory tactics by withdrawing employers—"tactics that could, and could be intended to, result in prohibitive collection costs to the plan." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (1980). Moreover, as a practical matter, employers have successfully rebutted the presumption in a substantial number of the reported MPPAA arbitration cases, and arbitrators have, consequently, reversed or substantially modified trustee withdrawal determinations. *See* cases cited *infra* note 12. The rebuttable presumption of correctness accorded the trustees' determination of withdrawal liability and the actuary's calculation of unfunded vested benefits, in no manner precludes any party to the dispute from a full hearing by neutral adjudicators consistent with the dictates of due process.

REASONS FOR AFFIRMANCE

I. THE INITIAL ADJUDICATION TO RESOLVE DISPUTES OVER WITHDRAWAL LIABILITY IS CONDUCTED BY AN IMPARTIAL ARBITRATOR, NOT BY PLAN TRUSTEES.

This Court is intimately familiar with the impetus giving rise to the enactment of MPPAA. *Connolly v. PBGC*, 475 U.S. 211, 213-18 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-23 (1984). In upholding the constitutionality of the statute, this Court summarized the rationale for MPPAA:

> Congress determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement. For this reason, Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans.

Connolly, 475 U.S. 227-28.

When an employer withdraws from participation in a multiemployer pension plan, MPPAA requires that the employer pay to the plan "the employer's proportionate share of the plan's 'unfunded vested benefits', calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *R.A. Gray*, 467 U.S. at 725. The plan administrator—who, in the case of multiemployer plans, is the joint board of labor and management trustees, 29 U.S.C. §§ 1002 (16)(A)(ii) and (16)(B)(iii)—must use the "presumptive" method for calculating the employer's liability, 29 U.S.C. § 1391(b), unless the plan has been amended to permit the calculation of withdrawal liability using one of three alternative methods, 29 U.S.C. §§ 1391(c)(2), (3), or (4).[2]

[2] None of these methods precisely determine the allocable unfunded vested benefits for an individual employer in relation solely to its own employees. Congress did not seek to make each withdrawing employer liable solely for the unfunded vested benefits of its own employees. Rather, Congress chose to make each employer liable for a share of the unfunded vested benefits of the plan as a whole. Thus, each withdrawing employer pays for the unfunded vested benefits of employee-participants which are not necessarily its own. Likewise, when a withdrawing employer does not contribute enough to satisfy its share of the unfunded vested benefits of the plan, or does not contribute a share commensurate with the vested benefits earned by its employee-participants, the employers that remain in the plan cover the cost of those benefits, either through increased contributions or through increased withdrawal liability. *See Berkshire Hathaway v. Textile Workers Pension Fund*, 874 F.2d 53, 55 n.2 (1st Cir. 1989); *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1554 n.4 (D.C. Cir. 1984).

Thus, the selection of a method to calculate withdrawal liability is a general plan administrative matter performed by the plan's administrator, *i.e.*, the trustees. Moreover, once an allocation method has been selected for the plan, either by operation of law or by amendment under 29 U.S.C. § 1391(c), MPPAA requires that the method of calculation be uniformly applicable to all withdrawing employers. 29 U.S.C. § 1394(b).[3]

All of the withdrawal liability calculation methods require the use of certain actuarial assumptions, which must be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan," 29 U.S.C. § 1393(a).[4] Consequently trustees must rely heavily, if not exclusively, on the expertise of the plan's actuary

[3] In addition, no plan rule or amendment under 29 U.S.C. § 1391(c) "may be applied without the employer's consent with respect to liability for a withdrawal or partial withdrawal which occurred before the date on which the rule or amendment was adopted." 29 U.S.C. § 1394(a).

[4] Pursuant to 29 U.S.C. § 1241, the Secretaries of Labor and the Treasury established a Joint Board for the Enrollment of Actuaries. This Joint Board has promulgated regulations which prescribe standards of performance for actuarial services, 20 C.F.R. § 901.20, and penalties for failure to adhere to these standards, 20 C.F.R. § 901.31.

to determine a reasonable interest rate and other assumptions necessary to make the withdrawal liability calculations.[5] *See* Comptroller General of the United States, GAO HRD-85-16, *Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* (1985).

Once the trustees notify the employer of the amount of its withdrawal liability, the employer may request the trustees to review "any specific matter relating to the determination of the employer's liability," 29 U.S.C. § 1399(b)(2)(A)(i), based on any additional relevant information supplied by the employer. 29 U.S.C. § 1399(b)(2)(A)(iii). "After a reasonable review" by the trustees, 29 U.S.C. § 1399(b)(2)(B), if there remains a dispute between the employer and the trustees, either party may initiate arbitration "in accordance with fair and equitable procedures to be promulgated by the [Pension Benefit Guaranty C]orporation." 29 U.S.C. § 1401(a)(2).

In the arbitration proceeding, the trustees' determination of withdrawal liability is presumed correct unless the employer shows "by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). Also, in the arbitration proceeding, the actuary's determination of the plan's unfunded vested benefits is presumed correct, unless the employer shows "by a preponderance of the evidence that (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods." 29 U.S.C. § 1401(a)(3)(B). Lastly, either the employer or the trustees may file an action in federal district court to "enforce, vacate, or modify" the arbitrator's decision. 29 U.S.C. § 1401(b)(2).

[5] Because of the sensitivity of the cost estimates to the interest assumption, the rate must be chosen with great care. "The rate should represent the expected rate of return on plan assets over the long term. It should not be changed to reflect fluctuations in the final market that appear to be transitory or of short-term duration." D. McGill, *Fundamentals of Private Pensions* at 325 (3d ed. 1975).

The Petitioner asserts that, with respect to the withdrawal liability determination procedures, trustees function as adjudicators. The Petitioner also baldly asserts that trustees and plan actuaries have an inherent bias to maximize assessments of withdrawal liability, which results in the denial of withdrawing employers' due process right to an impartial adjudicator.[6]

However, trustees do not play an adjudicatory role. Rather, they "are simply part of an administrative procedure set up by Congress for reaching an initial determination of withdrawal liability which is then challengeable in arbitration and in court." *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1140 (1st Cir. 1985) (*en banc*). And, if the trustees are not adjudicators, they cannot be biased adjudicators.[7]

[6] With respect to conclusory statements about untempered trustee and actuarial bias, we note that assertions of bias "require substantiation before they can provide a foundation for invalidating an Act of Congress." *Schweiker v. McClure*, 456 U.S. 188, 196 n.10 (1982).

[7] The Petitioner and its *amici* have tried to transmogrify the plan trustees' fulfillment of their fiduciary duty to collect money owed the trust into a manifestation of bias. In response, we note that in H.R. Rep. 96-869, 96th Cong., 2d Sess. 67 (1980), the Congress made "it clear that the trustees' role is not simply to find the highest value for withdrawal liability; they would not meet their fiduciary duty to the fund, for example, if they set excessively high withdrawal liabilities which would have the effect of discouraging future participation." *Keith Fulton*, 762 F.2d at 1142-43. *But see Yahn*; *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 93 (3d Cir. 1990) (holding that "trustee bias in favor of the fund carries over to an actuary selected and paid by the trustees").

Trustees are, by definition, the plan's "administrator," 29 U.S.C. § 1002(16)(A)(ii) and (16)(B)(iii). Consequently, their role "is one of administration or enforcement rather than adjudication." *Dorn's Transp., Inc. v. I.A.M. Nat. Pension Fund*, 578 F. Supp. 1222, 1237, (D.D.C. 1984), *aff'd*, 753 F.2d 166 (D.C. Cir. 1985). Certainly, the initial determination of the amount of withdrawal liability is made by the trustees, based on calculations performed and decisions made by the plan's actuary.[8] Yet, making a determination concerning an obligation to pay money no more converts a trustee—let alone, a plan actuary—into an adjudicator than does a trustee decision to collect delinquent contributions and assess liquidated damages, *see* 29 U.S.C. § 1132(g)(2), or an actuary's selection of a funding method or assumptions, 29 U.S.C. § 1082(c).

Due process does not demand impartiality on the part of every decision maker. Rather, "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities," *Schweiker v. McClure*, 456 U.S. at 195. The inherent trustee right to calculate and collect amounts owed the trust has not been found to convert a trustee into an adjudicator. This independent right of trustees is a fundamental prerequisite to the discharge of all fiduciary duties found at common law; all such duties that are detailed in ERISA; and those fiduciary duties that have been interpreted by the federal ju-

[8] For example, the plan's actuary calculates the value of the plan's unfunded vested benefits. This critical calculation—which is the basis for determining an employer's liability under any method permitted under ERISA, 29 U.S.C. §§ 1391(b) and 1391(c)(2), (3), and (4)—is presumed correct, unless an employer demonstrates by a preponderance of the evidence that the actuarial assumptions and methods "were, in the aggregate, unreasonable" or that the plan actuary "made a significant error in applying the actuarial assumptions or methods," 29 U.S.C. § 1401(a)(3)(B). Even the *Yahn* court did not declare this presumption to be unconstitutional, even though it found the presumption of correctness of trustee decisions to be unconstitutional.

diciary. *See, e.g.*, 2 *Scott on Trusts* § 177 (3d ed. 1967); *Jim McNeff Inc. v. Todd*, 461 U.S. 260 (1983); 29 U.S.C. §§ 1132(g)(2), 1342(d)(1)(B)(ii).

It is only after the trustees make their determination of liability that MPPAA provides for the "Resolution of Disputes," 29 U.S.C. § 1401. This adjudicatory stage of dispute resolution, to which a due process analysis is appropriately applied, begins with the arbitration proceeding prescribed at 29 U.S.C. § 1401.

The arbitration proceeding required by MPPAA must be conducted according to "fair and equitable procedures" established by the PBGC. 29 U.S.C. § 1401(a)(2). The arbitration procedures, which were finally promulgated by the PBGC in August 1985 after several years of careful review, painstakingly assure that both the withdrawing employer and the plan trustees are full and equal participants in the selection of the arbitrator. 29 C.F.R. § 2641.3.

To ensure complete impartiality, an arbitrator must disclose any bias or interest in the outcome of the arbitration which should result in the arbitrator's disqualification and withdrawal, 29 C.F.R. § 2641.3(b). Moreover, at any time before the final award is made, any party may challenge the arbitrator's impartiality and seek his/her withdrawal, 29 C.F.R. § 2641.3(c). Additionally, the PBGC-mandated procedures provide for prehearing discovery; the presentation of a wide array of evidence; maintaining a record and transcript of the proceedings; submission of written briefs; calling of witnesses, including expert witnesses; preparation of written findings of fact and conclusions of law by the arbitrator; and reopening the proceedings. 29 C.F.R. § 2641.

In addition to its promulgated arbitration rules, the PBGC has formally approved alternative procedures sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association ("AAA"). These AAA rules have been used

by multiemployer plan trustees and withdrawing employers since their initial formulation and publication in June 1981. Like the PBGC procedures, they are comprehensive and ensure complete arbitral fairness and impartiality.[9]

As this Court repeatedly has recognized, there is a presumption that an adjudicator is unbiased and "the burden of establishing a disqualifying interest rests on the party making the assertion." *Schweiker v. McClure*, 456 U.S. at 196. Our research has revealed no withdrawal liability case where there has been even a suggestion that the procedure for the selection of the arbitrator or the rules governing the conduct of the arbitration proceeding are unfair.

A fundamental part of due process requires that no person will be deprived of his right to "a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico Inc.*, 446 U.S. 238, 242 (1980). Yet, there has been no showing of arbitral predisposition in this case. The situation here is unlike *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *Tumey v. Ohio*, 273 U.S. 510 (1927), or *Gibson v. Berryhill*, 411 U.S. 564 (1973), where the adjudicators had a clear interest in the outcome of the dispute. No attack has been made, in this or any other MPPAA case, on the impartiality or fairness of the arbitrator, the statutory and PBGC-promulgated arbitration procedures, or the judicial review of the arbitration.

The arbitrator selection process, the arbitration procedures mandated and approved by the PBGC, and the

[9] For example, Section 11 of the Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes provides that the AAA shall submit a list of proposed expert arbitrators to each party, and each party shall then engage in a numerical ordering of arbitrator preference which is designed to result in an acceptable, mutual choice. If the parties cannot agree on any proposed arbitrator, the AAA shall make the choice.

availability of federal court review of arbitration decisions are fully consistent with this Court's "powerful and independent constitutional interest in fair adjudicative procedure." *Jerrico*, 446 U.S. at 243.

II. THE REBUTTABLE PRESUMPTION OF CORRECTNESS, APPLICABLE TO WITHDRAWAL LIABILITY DETERMINATIONS MADE BY PLAN TRUSTEES, IS A RATIONAL CONGRESSIONAL RESPONSE TO PROMOTE THE FINANCIAL STABILITY OF MULTIEMPLOYER PLANS.

Given the congressionally articulated need to preserve multiemployer pension plans and safeguard their solvency, *Connolly*, 475 U.S. at 227-28, and the congressional intent to impose liability "only to the extent necessary to achieve the legislative purpose," *Nachman Corp. v. PBGC*, 592 F.2d 947, 962 (7th Cir. 1979), *aff'd*, 466 U.S. 359 (1980), "it is not irrational for Congress to impose presumptions as a disincentive to challenging the trustees' determination precisely because . . . there is a range of 'reasonable' withdrawal liability amounts." *Keith Fulton*, 762 F.2d at 1143. And, when Congress creates a statutory right—*e.g.*, a plan's claim for withdrawal liability—Congress "clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof. . . ." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982).

This Court long ago acknowledged that "[t]he law of evidence is full of presumptions either of fact or law." *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 42 (1910). Further, this Court has consistently held that due process is not jeopardized if there is a "rational connection between the fact proved and the ultimate fact presumed" and that

> [i]f a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his

> defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

Turnipseed, 219 U.S. at 43.

In the multiemployer plan withdrawal liability setting, the "facts proved" compromise the application of the rules for withdrawal liability determination set forth in ERISA at 29 U.S.C. §§ 1381 through 1399. The "facts presumed" are that trustees correctly apply these withdrawal liability rules to calculate the amount of liability and that plan actuaries correctly select and apply actuarial assumptions and methods that are reasonable in the aggregate. The rational basis for the presumption was articulated by the Senate Committee on Labor and Human Resources:

> The Committee includes the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally 'correct' approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan.

Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration*, 20-21 (1980).[10]

The deference accorded the plan's actuary under the withdrawal liability calculation and assessment process is reflective of an established congressional intent that

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[10] *See* H.R. Reg. No. 96-869, 96th Cong., 2d Sess. 86 (1980):

> These rules are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligations by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination.

the assumptions of the plan's actuary will not be challenged—not even by the Internal Revenue Service—unless they are "substantially unreasonable":

> [P]lan liabilities must be determined on the basis of actuarial assumptions that, in the aggregate, are reasonable. [The House Ways and Means C]ommittee recognizes that frequently there is a range of actuarial assumptions which may be appropriate for determining the costs of a defined benefit pension plan, and the choice of the appropriate assumptions is very much a matter of judgment.
>
> Since the actuarial assumptions used must be reasonable in the aggregate, it is anticipated that on audit, the Internal Revenue Service will (as presently) require a change of assumptions where they do not meet this standard. *However, unless the assumptions used are substantially unreasonable, it is contemplated that generally the Service will not require a change of assumptions to be made effective for years prior to the year in which the audit is made.*

H.R. Rep. No. 807, 93d Cong., 2d Sess. at 95 (1974) (emphasis supplied).

The Congress also stressed that "frequently there is a range of actuarial assumptions which may be appropriate for determining the costs of a defined benefit pension plan, and the choice of the appropriate assumption is a matter of judgment. In this circumstance, [the plan sponsor] may attempt to substitute [the plan sponsor's] judgment for that of [the plan's] actuary, which may lead to situations where plan costs are not being independently determined by an actuary. The committee believes that it is inappropriate for [the plan sponsor] to substitute [the plan sponsor's] judgment in these matters for that of a qualified actuary. . . ." H.R. Rep. No. 807, 93d Cong., 2d Sess. at 95 (1974); S. Rep. No. 383, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4890, 4954.

The "judgment" is to be that of the plan's actuary. In the Fourth Circuit's decision in *Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727, 734 (4th Cir. 1990), the court highlighted the fallacy of second-guessing a plan actuary and, in so doing, the court rejected an argument that an actuary must select an interest rate which is at least as high as that available from United States Treasury securities:

> The current level of the risk-free rate might be relevant in determining what range of interest rates will likely be earned within a certain time frame; but its existence cannot be considered a floor for valuing benefits, or else, pension plans would be forced to invest in only government securities since they could not chance holding a riskier portfolio and producing less than the riskless rate of return. Investing's customary component of prudent risk taking is nowhere outlawed in the relevant statutory provisions.

See Board of Trustees, Michigan United Food & Commercial Workers v. Eberhard Foods, 831 F.2d 1258, 1262-63 (6th Cir. 1987) (also rejecting T-bill rate argument).

Given these ranges of reasonableness and the complexities of the withdrawal liability determinations, even in the sole appellate court decision, finding that the rebuttable presumptions in favor of the trustees are unconstitutional, that court could "not deny the *Keith Fulton* court's view that the presumptions are [a] rational means of promoting uniformity and discouraging litigation." *Yahn & McDonnell*, 787 F.2d at 141. *See Keith Fulton*, 762 F.2d at 1144-45.

Furthermore, under MPPAA, the presumptions of correctness are rebuttable. The provisions in question do "little more than allocate the burden of proof to the challenger and direct that issues which are close be resolved in favor of" the plan trustees. *Republic Industries*, 718 F.2d at 641. As one arbitrator put it, in resolving a withdrawal liability dispute, the presumption should be interpreted as a device "to avoid procedural process problems." *Eberhard Foods, Inc., and RSEU Joint Pension Fund*, 6 Employee Benefits Cas. (BNA) 1961, 1966 (1985) (Glover, Arb.). The presumption is not to be viewed as "a 'per se' rule in favor of the Fund" or an "impenetrable 'safe harbor'. . . ." *Id.* Moreover, as a practical matter, arbitrators have not hesitated to rule that trustee withdrawal liability determinations have been unreasonable or erroneous. Indeed, in a significant number of the reported MPPAA withdrawal liability arbitration cases, employers have successfully rebutted the presumptions, and arbitrators have, consequently, reversed or substantially modified trustee determinations.[11]

MPPAA, too, expressly authorizes the federal district courts "to enforce, vacate, or modify the arbitrator's award," 29 U.S.C. § 1401(b)(2), thereby affording the parties to the dispute an additional layer of impartial review. While MPPAA requires that in any district court proceeding there shall be a presumption that the arbitrator's findings of fact are correct, 29 U.S.C. § 1401(c), the presumption is rebuttable and ERISA does not deprive the trial or appellate courts of any of their normal judi-

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[11] *E.g., Hankin Transportation Personnel, Inc. and Teamsters 641 Pension Fund*, 14 Employee Benefits Cas. (BNA) 2852 (1991) (Pereles, Arb.); *Underground Construction Co. and Carpenters Pension Trust Fund for Northern California*, 14 Employee Benefits Cas. (BNA) 1543 (1991) (Twohey, Arb.); *Carnation Co. and Central States Pension Fund*, 9 Employee Benefits Cas. (BNA) 1409 (1988) (Nagle, Arb.); *PMTA-ILA Pension Fund and E.W. Coslett & Sons, Inc.*, 6 Employee Benefits Cas. (BNA) 2705 (1985) (Jaffee, Arb.); *Buy-Low, Inc. and Trustees, Food Workers Pension Fund*, 5 Employee Benefits Cas. (BNA) 2641 (1984) (Bowles, Arb.); *ITU Pension Plan and Ft. Worth Star Telegram*, 5 Employee Benefits Cas. (BNA) 1193 (1984) (Mittelman, Arb.); *Perkins Trucking Co. and Local 807 Pension Fund*, 4 Employee Benefits Cas. (BNA) 1489 (1983) (O'Loughlin, Arb.); *Herman Segall, Inc. and ILGWU Retirement Fund*, 3 Employee Benefits Cas. (BNA) 2449 (1982) (Pillsbury, Arb.).

cial powers. *See Combs v. Classic Coal Corp.*, 931 F.2d 96, 100 (D.C. Cir. 1991) (holding that the existence of a statutory presumption does not preclude review); *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 90-93 (3d Cir. 1990) (affirming arbitrator's determination that employer had rebutted presumption of correctness of actuary's valuation of unfunded vested benefits); *Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727, 730-33 (4th Cir. 1990) (rejecting trustees' argument that inquiry into reasonableness of an actuarial assumption cannot be undertaken if the same actuarial assumption "is reasonable for funding purposes").

This Court has consistently upheld statutory presumptions favoring one side of a dispute over the other. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), not only were certain rebuttable presumptions upheld in favor of coal miners seeking compensation for their suffering from black lung disease, but the Court ratified the constitutionality—on procedural due process grounds—of two irrebuttable presumptions. And, in *United States v. Gainey*, 380 U.S. 63 (1965), the Court upheld a statutory presumption that the mere presence of a defendant at the site of an illegal liquor still is deemed sufficient evidence to authorize conviction for certain felonies in connection with the operation of illegal distilleries.

In *Weinberg v. Salfi*, 422 U.S. 749 (1975), the Court upheld an irrebuttable statutory presumption that precluded surviving wives and stepchildren from receiving certain social security benefits based on a marriage relationship with a deceased wage earner, if the duration of the material relationship was for less than nine months. The Court in *Weinberger* stated that a prophylactic rule was acceptable, if there were a rational public policy underlying the congressional determination. In view of this Court's holding in such cases as these, there is simply no basis for finding that procedural due process is violated by the statutory presumptions in MPPAA. We

note, too, that presumptions are perforce given to non-neutral parties—whether the presumption is given to a railway employee's widow seeking recompense from the railroad (*Turnipseed*) or to the Social Security Administration seeking to minimize the amount of the public fisc that is payable to a widow (*Salfi*).

"It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The totality of the withdrawal liability assessment process from the initial determination by the plan trustees that a withdrawal has occurred, through the arbitral dispute resolution process to the final review by the federal courts, is rational, impartial, and fair. The rebuttable presumption of correctness, accorded the initial trustee and actuarial determinations, in no manner precludes any party to the dispute from a full hearing by neutral adjudicators, for the arbitrator and the courts are not deprived of any authority to reverse or modify the determination by the plan trustees or the plan actuary.

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges this Court to affirm the decision of the court of appeals in this case.

Respectfully submitted,

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